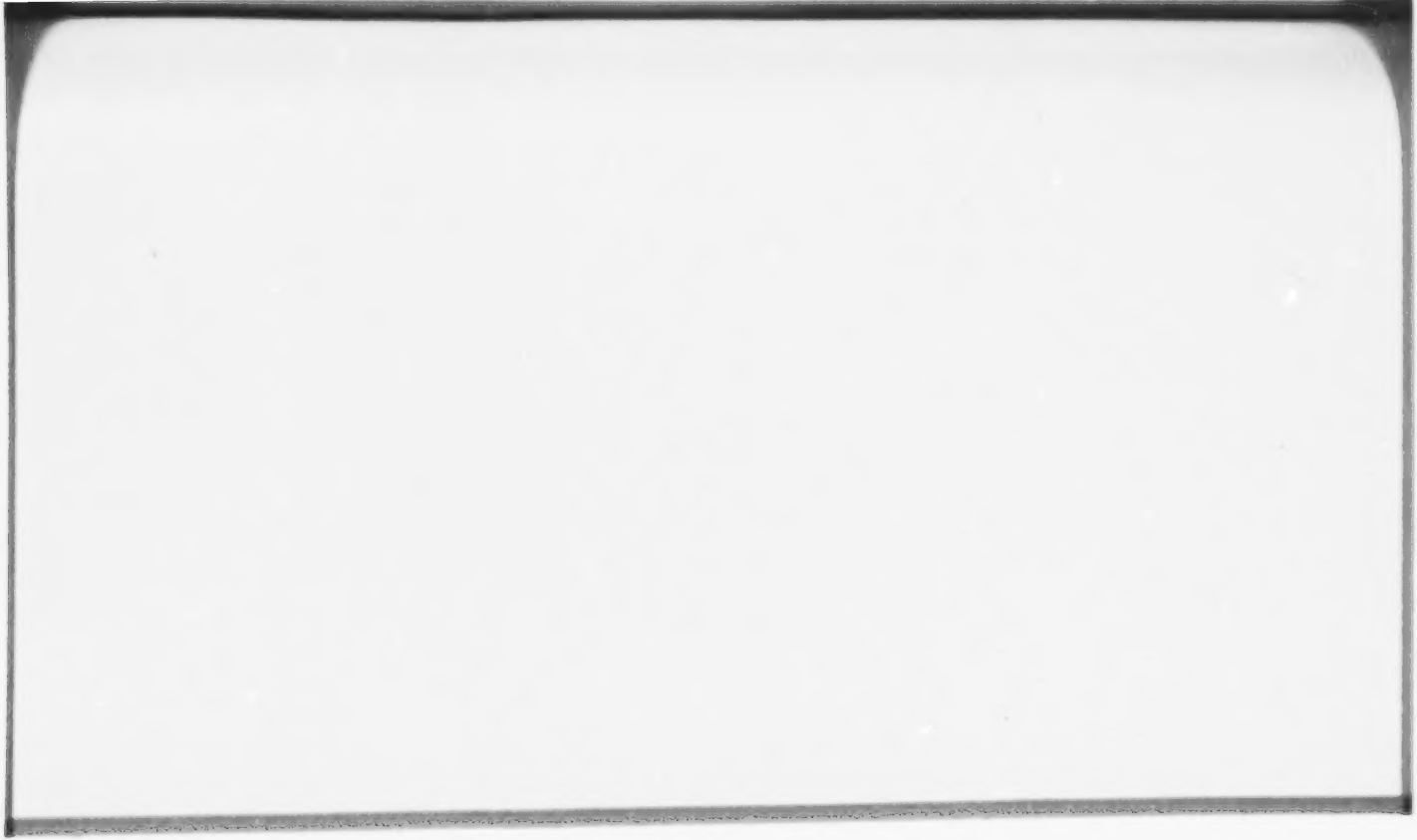

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Office Supreme Court U. S.
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Clerk.

No. 220.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY.

ON WRIT AND CROSS-WRIT OF CERTIORARI.

BRIEF OF COUNSEL FOR THE FIDELITY AND DEPOSIT COMPANY.

RICHARD H. LIGGETT,
WINFIELD LIGGETT,
Counsel.

THE H. & W. B. DREW COMPANY JACKSONVILLE FLA. 100000

In the Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND
vs.
THE L. BUCKI & SON LUMBER COMPANY, ON CROSS WRITS OF CERTIORARI.
No. 220.

BRIEF FOR THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The part first of this brief will be devoted to the specifications of error of the Fidelity Company and the second part to those of the Bucki Company, and as a rule the Fidelity Company will be referred to as the defendant and the Bucki Company as the plaintiff.

PART FIRST.

STATEMENT OF CASE.

Prior to Oct. 1, 1897, the Atlantic Lumber Co. had been engaged in furnishing the Bucki Company with logs with which to operate its saw mill, at the rate of 2,000,000 feet per month, but on that day cancelled the contract on account of a breach thereof by the Bucki Company, and brought one action at law against it for $200,000 damages, and as ancillary, sued out an attachment for $75,000, against the property of the Bucki Company, and also another action at law to enforce a log lien for the sum of $9,980.80, claimed to be due for logs delivered, and sued out an ancillary attachment for this amount also. The smaller attachment was levied on certain logs and lumber, upon which the lien was claimed to exist, and the larger attachment for $75,000 was levied on all the

personal property of the Bucki Company and upon its mill plant. The mill was a fixture, or a part of the realty, and the writ did not operate to dispossess the Bucki Company of that (Rec., 184). The Fidelity Company became the surety upon the attachment bonds. These actions were removed into the United States Circuit Court for the Southern District of Florida, and afterwards, on November 1st, 1897, the smaller writ of attachment was dissolved, and on February 14, 1898, the larger writ was dissolved. In June, 1897, the Atlantic Lumber Company sued out a writ of error in the larger suit and obtained an order superseding the order dissolving the attachment for $75,000. The Circuit Court of Appeals finally disposed of this writ of error in January, 1899, by affirming the judgment of the lower Court.

Soon after the dissolution of these writs of attachment the Bucki Company brought the present action against the Fidelity Company upon the two attachment bonds referred to in the Circuit Court for Duval County, Florida, from which Court it was removed into the United States Circuit Court for the Southern District of Florida.

The Bucki Company obtained judgment, and each party reserved a bill of exceptions and removed the Record into Court of Appeals by writ of error. The Court of Appeals modified the judgment and affirmed it as modified. Afterwards each party applied for and was allowed a *writ of certiorari* by this Court.

In the declaration filed in this case the plaintiff claimed the following damages:

Damages due to the employment of attorneys to secure the dissolution of the attachment, and damages for loss of credit, interruption of business and loss of profits.

The defendant moved the Court to strike all of these allegations from the declaration (Rec., 18, 19), and the Court ordered the allegations relative to damages arising from the *employment of attorneys*, and from *injury to credit* to be stricken (Rec., 19, 20), which was done accordingly on February 16, 1899 (Rec., 22). Afterwards the Court restored these allegations "subject to any subsequent ruling and charge of the Court to the jury" (Rec.,

27). The action went to trial on the plea of not damaged as alleged in the declaration (Rec., 24).

At the trial the Court admitted evidence relative to the value of the services rendered by counsel for the Bucki Company in connection with the attachment proceedings, and instructed the jury to find a special verdict as to the value thereof (Rec., 114, 115).

The jury found a general verdict for $10,880 and a special verdict for $7,500 on account of attorneys' fees (Rec., 28). Afterwards the Bucki Company moved for judgment for the amount of both of these verdicts, and the Court entered judgment for the amount of the general verdict, but refused to give judgment for the amount of the special verdict (Rec., 116).

The Bucki Company excepted to the refusal to include the attorneys' fees, and assigned it for error in the Court of Appeals (Rec., 44). The Court of Appeals reversed the action of the Circuit Court in this particular, and amended the judgment of the Circuit Court by including the amount of the special verdict, and affirmed the judgment as amended (Rec., 119).

Judge Shelby, of the Court of Appeals, dissented, and the opinion of the Court and the dissenting opinion appear in the Record at pages 121 to 142.

The action of the Court of Appeals in allowing these attorneys' fees constitutes the basis of the defendant's first specification of error.

During the progress of the trial of the case the plaintiff was allowed to prove over defendant's objection that at the time of the levy of these writs of attachment, it was engaged in the business of manufacturing lumber at the rate of about 100,000 feet per day, and over like objection, the president of the plaintiff company was permitted to testify that for the six months preceding October 1, 1897, plaintiff's profits in its business had been as follows: For March, $8,722; April, $7,966; May, $8.154; June, $3,269; July, $5,067; August, $1,932, and September, $422.

The defendant excepted to the admission of this evidence on the grounds that it was immaterial, and because neither injury to business nor loss of profits could be re-

covered, and because profits realized prior to October 1, 1897, were not a proper criterion of what might be made afterwards (Rec., 183).

The bill of exceptions recites that it was "established" at the trial that on October 1, plaintiff had on hand various orders for lumber which it was unable to completely fill. That on October 9 the sheriff surrendered 1,250,000 feet of lumber to plaintiff upon forthcoming bond; that on October 11 he surrendered the possession of the logs in the boom to the plaintiff to be sawed up, and, being indemnified, permitted plaintiff to ship the lumber away from the mill as fast as vessels arrived; that the mill ran at its full capacity from October 11 to November 7, 1897, during which time all logs in the boom were sawed up; that on November 4, 1897, plaintiff gave the sheriff a forthcoming bond which released all the logs, lumber and personal property levied on; that prior to December 28, 1897, all lumber on hand October 1, 1897, and all subsequently manufactured from logs then on hand had been shipped and delivered by plaintiff to parties in New York and Boston with whom plaintiff had contracts on October 1, except about 2,000,000 feet of old or second-class lumber, which on December 28, 1897, was seized under the attachments of other creditors; *"that there was no evidence to show, or tending to show, that the defendant got any less for this lumber than it would have received had no attachments been levied, or that the lumber deteriorated while in the sheriff's possession, or was injured in any way; and that it was established that the price of lumber improved after October* 1, 1897."

It was also established that "the saw mill plant was a fixture, and that the sheriff never took possession of it, and only levied the attachment so as to create a lien on it" (Rec., 186, 187).

Section 1651 of Revised Statutes provides that "the levy of a writ of attachment shall not operate to dispossess the tenant of any lands or tenements, but a levy on real estate shall bind the property attached."

It appears from these declarations of the bill of exceptions that no profits were lost on the logs and lumber attached and that they were not injured in any way, and

that consequently the evidence in regard to profits made in the past could have no proper relation to the seizure and detention of this property. The defendant accordingly, at the close of the testimony, moved the Court to exclude the evidence in regard to profits made prior to October 1, 1897, but the Court denied the motion (Rec., 98). In view of the above, there was only one purpose for which this testimony could have been retained, and that was to support the claim of the plaintiff that but for the levy of these writs it would have been able to continue in business, and make a profit thereby; and viewed from that aspect the testimony was clearly illegal, especially under the circumstances of this case which were as follows:

It was established by the evidence that prior to October 1, 1897, the Bucki Company had been supplied with logs by the Atlantic Lumber Company under a contract which required the delivery of 2,000,000 feet of logs per month at a fixed price (Rec., 91), but that on October 1 the Atlantic Lumber Company cancelled this contract and refused to deliver more logs (Rec., 186); that after the logs on hand October 1, 1897, and about 400,000 feet subsequently purchased had been sawed up, the plaintiff had to finally shut down its mill, because of its inability to procure the logs from any other source with which to operate its mill (Rec., 186, 187).

It was admitted by the Bucki Company that as the result of the cancellation of this contract, it would have been necessary for it to have embarked in the logging business itself in order to supply its mill, and it proved by one Murphree that such an enterprise would have required an investment of $150,000 to $250,000 (Rec., 87).

It was established by the evidence and not disputed that in September, 1897, the credit of the Bucki Company was very bad; that its commercial paper had gone to protest from time to time during the summer of 1897; and that a piece of its commercial paper for $5,340 had been under protest for over a month prior to October 1, 1897 (Rec., 86, 188 and 70).

The Bucki Company proved by one Stevens that its mill plant was worth from $5,000 to $75,000, according to the use that could be made of it (Rec., 87).

There was evidence tending to show that the Bucki Company received the gross sum of $39,385 for the lumber shipped from the mill after October 1, 1897, which of course makes no allowance for the cost of operating the mill subsequently to that date (Rec., 201).

It was also established that the plaintiff owed $64,000 and had but $112.50 in cash (Rec., 87).

It would appear from this that the profits made prior to October 1, 1897, were in no sense a proper criterion of what might have been made afterwards. Prior to that date the Bucki Company had a steady supply of logs at a fixed price. After that time its ability to procure the logs depended upon the procurement of the large sums of money necessary for that purpose, and had the money been procured the cost of the logs would have been a matter of mere conjecture.

There was testimony tending to show that prior to October 1, 1897, the Bucki Company was negotiating with Shepard, Morse & Co., of Boston, for an advance of $25,000 upon the security of its mill plant and lumber, the same to be repaid by the delivery of lumber at the existing market price. This, of course, amounted to a mere sale of lumber, the price being paid in advance, and as the Bucki Company sold all of its lumber immediately after October 1, 1897, and upon a rising market, it is not perceived how that fact affects the question.

These facts show that the testimony in regard to profits made prior to October 1, 1897, should have been stricken out altogether.

As already stated, on the day before the case was submitted to the jury, defendant moved the Court to strike out all testimony relative to injury to business, loss of profits, etc., and the Court made the following order:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that, under the testimony introduced, any damages arising from the con-

sideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber, and the supply of timber lands; all testimony to the damage to credit, loss of profits, and all evidence relative to the market price of lumber subsequent to the attachment.

"*That in regard to the profits plaintiff's mill had been making prior to October* 1, 1897, *be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment,* and the motion be denied in all other respects" (Rec., 98).

In a colloquy between the Court and counsel, the Court said that he intended to permit the previous profits to be considered for the purpose of showing the damages sustained while the property was in the possession of the sheriff, and that the evidence showed it was released on October 11 (Rec., 102).

The defendant's counsel argued the case on this hypothesis, but when the Court came to charge the jury, it altogether departed from this limitation

It instructed the jury that it was a question of fact for them to determine upon all the evidence in the case, whether the plaintiff would have been able to continue in business if these attachments had not been levied, and if they should find that the plaintiff could have done so, they should then award to the plaintiff such an amount of damages as they, upon the evidence, felt convinced the plaintiff had sustained as a direct and proximate consequence of the attachments; that they, the jury, were the exclusive judges as to the effect of the attachment on the business of the plaintiff (Rec., 174); that the jury were the exclusive judges of the amount of the damages the plaintiff had sustained, and that among the damages to be considered by them were those caused by the interruption of plaintiff's business and from disabling the plaintiff to deliver lumber it had agreed to deliver (Rec., 174, 175).

The Court instructed the jury also to award damages for the entire period that the lien of the attachment re-

mained on the lumber and logs, and that it was the province of the jury to determine the length of time the attachment lien continued operative on the property attached (Rec., 174).

These charges were duly excepted to, and will be stated in full hereafter, and they are mentioned here for the purpose of showing that the jury was permitted to consider this testimony in regard to profits for any purpose they saw fit, and to make it the basis of the wildest speculation. The plaintiff had been allowed to show that the attachment lien on the mill had been kept alive by a supersedeas while the case was in the Court of Appeals, from March, 1898 to January, 1899, and the Court instructed the jury that though the personal property had been released on forthcoming bonds, that yet said property was deemed to be in the custody of the law (Rec., 202).

The Court also permitted the plaintiff to prove and recover certain special damages not claimed in the declaration, as follows:

Damages due to the employment of four watchmen at the rate of $75.00 per week to watch the mill during the time it was under the lien of the attachment, notwithstanding that the mill was a fixture and that the sheriff never took possession of it, and although it was being operated during most of that period by the plaintiff and its lessee. The admission of this testimony was duly excepted to, and is made the basis of the 10th specification of error in this Court.

The plaintiff was also permitted to prove that certain of its employees were employed by the year (Rec., 193), and instructed the jury that they should consider whether any of the time of such employees had been lost as the result of the attachment, and to award damages accordingly. This charge was duly excepted to, and is made the basis of the 11th specification of error.

It appeared that after the lapse of seven working days the mill started up and finally shut down November 16 for want of logs to saw (Rec., 193). Under these circumstances the defendant requested the Court to give a charge limiting the recovery of damages on account of

time lost by employees to the seven working days in October, but the Court refused this charge and such refusal is made the basis of the 12th specification of error.

The plaintiff proved that shortly after the levy of these writs of attachment it procured the release of all the personal property, by giving the sheriff two forthcoming bonds, and proved that after the attachment for $75,000 had been dissolved the defendant sued out a writ of error to the Court of Appeals and superseded the order of dissolution, and that the case was pending in the Court of Appeals until January 1899, when the judgment of the lower Court was affirmed (Rec., 200).

The Court likewise permitted the plaintiff to prove that in May, 1899, this defendant applied to the Supreme Court for a writ of certiorari in the attachment case. Upon these facts the Court instructed the jury, in substance, that notwithstanding the execution of the forthcoming bonds the property was still presumed to be in the custody of the law and remained subject to the liens, and that the plaintiff was bound to have the property forthcoming for re-delivery to the sheriff in case he should demand it, and that the plaintiff could not sell the property and give a good title to it, and that if the plaintiff did sell the lumber "in contemplation of law, the plaintiff held the proceeds of such sales in its hands, and had the legal right to retain the proceeds of such lumber in its hands to pay any judgment that might be recovered against it, * * * until such lien of the attachments ceased to exist." And the Court instructed the jury to award damages to the plaintiff for the entire length of time the lien remained on the property, and instructed the jury that it was their "province and duty" to determine how long the liens continued operative on the property (Rec., 202, 203).

These charges, containing these new and startling doctrines, are made the basis of the 13th to 17th specifications of error, inclusive. The plaintiff had sold all this lumber prior to December 28, 1897 (Rec., 201), and the defendant offered to prove that plaintiff had made immediate use of the proceeds, but the Court declined to admit the evidence (Rec., 185). Such refusal was

duly excepted to and is made the basis of the 18th specification of error.

The plaintiff was likewise permitted over defendant's objection to prove that it gave a mortgage upon its mill plant to secure the surety company that executed the forthcoming bond for $100,000, and that the mortgage was not released until June 6, 1899. The defendant duly excepted to the admission of this evidence (Rec., 183), and the ruling of the Court is made the basis of the 19th specification of error.

The plaintiff, over the objection of the defendant, was permitted to introduce evidence tending to show that prior to October 1, 1897, the plaintiff had had negotiations with Shepard, Morse & Co., of Boston, for the loan of $25,000, to be secured by a mortgage on the mill plant and certain boards thereafter to be manufactured, and that as a part of such proposed agreement the said Shepard, Morse & Co. were to take a million feet of boards at the then existing market price. The defendant duly excepted to the admission of this evidence (Rec., 182), and the ruling is the basis of the 9th specification of error.

The Circuit Court specially charged the jury to decide from the evidence whether the attachment defeated the consummation of this contract (Rec., 190).

There were several other matters which were made the subject of exceptions and assignments of error, which will be stated in another place.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals erred in reversing the decision of the Circuit Court disallowing the recovery of attorneys' fees incurred in defending the attachment as an element of damages to be recovered on the bond, and the Court of Appeals erred in amending the judgment of the Circuit Court by including therein the amount of such attorneys' fees, as found by the jury in its special verdict (Rec., 119).

II.

The Circuit Court erred in permitting the plaintiff to prove the profits of its mill between March 1, 1897, and October 1, 1897, and to prove that such profits had been as follows: $8,722.40 for March; $7,966 in April; $8,154.48 in May; $3,269.81 in June; $5,067.48 in July; $1,932.12 in August; and $422 in September. And the Court of Appeals erred in not sustaining the assignment of error on this point.

The admission of this evidence was the basis of the ninth exception (Rec., 183), and of the tenth assignment of error in the Court of Appeals (Rec., 173).

III.

The Circuit Court erred in giving the following charge to the jury:

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties caused by these attachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties in consequence of the attachment, because, as the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business even if the attachments had not been issued and levied. This is a question of fact for you to determine upon all the evidence in the case, and if you believe, from all the evidence in the case, that if these attachments had not been issued and levied upon the plaintiff's properties, it, the plaintiff, would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained, as a direct and proximate consequence of these attachments." And the Court of Appeals erred in not sustaining the Fidelity Company's assignment of error based on this charge. This charge was the basis of the Fidelity Company's 15th exception (Rec., 188), and of the 17th assignment of error in the Court of Appeals (Rec., 174).

IV.

The Circuit Court erred in giving the following charge to the jury:

"The jury are the exclusive judges as to the effect of the writs of attachment upon the business of the plaintiff. That is to say: When you consider any item of damages in this case, you are the sole judges as to whether the writs of attachment and the levy of the same directly and proximately caused the damage and injury, or whether there was some other intervening cause of the damage or injury, independent of the attachment, that would have caused the damage if the attachment had not been issued."

And the Court of Appeals erred in not sustaining the assignment of error on this point. This charge constituted the Fidelity Company's 17th exception (Rec., 189), and 19th assignment of error (Rec., 174).

V.

The Circuit Court erred in giving the following charge to the jury:

You are the exclusive judges as to the facts of this case. You are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequences of the issuing of these writs of attachment. These damages consist of two general consequences:

"1st. * * * [The exception was taken to the following paragraph:]

"2d. All consequential damages, that is, all damages caused by the interruption of the plaintiff's business, either by disabling plaintiff to operate its mill, or by disabling it to deliver timber and lumber it had agreed to deliver prior to October 1, 1897, if you believe from the evidence that the direct and proximate effect of such attachment caused such interruption of the plaintiff's business."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge.

This charge constituted the basis of the 19th exception (Rec., 190), and of the 21st assignment of error (Rec., 175).

VI.

The Circuit Court erred in giving the following instruction to the jury:

"It is the right and province of the jury to decide from the evidence whether or not these writs of attachment prevented the performance of any contract with Shepard, Morse & Co. for the loan of money, or the delivery of lumber, and the damages sustained by the plaintiff for such nondelivery, and it is your right and duty to decide, upon the evidence, whether or not these writs of attachment prevented the plaintiff from delivering any lumber to Degnen, McLean & Co., or to E. B. Hunting & Co., which plaintiff, prior to October 1, 1897, had contracted to deliver, and if you find such prevention of deliveries, to award such damages as the evidence justifies."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 18th exception (Rec., 190) and of the 20th assignment of error (Rec., 174).

VII.

The Circuit Court erred in refusing to give the jury the following charge at the defendant's request:

"The Court instructs the jury that they shall allow the plaintiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1, 1897, if such inability to fill orders was due to the fact that the plaintiff was unable to buy the logs from which to cut the lumber."

And the Court of Appeals erred in not sustaining the assignment of error based on the refusal of this charge. The refusal of this charge constituted the 20th exception (Rec., 192), and the 22d assignment (Rec., 175).

VIII.

The Circuit Court erred in charging the jury as follows:

"Another element of damages claimed by plaintiff is that the attachment interrupted its business, and by such interruptions, and consequences thereof resulting from the attachment, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff had agreed to furnish prior to October 1, 1897; and such losses consist of certain amounts that the purchasers of the lumber had to pay to supply what they had purchased of the plaintiff in excess of the contract price they had agreed to pay plaintiff. The Court instructs you that the defendant is liable for all such losses, if any resulted as a direct consequence of the attachments."

And the Circuit Court erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 17th exception (Rec., 189), and of the 18th assignment of error Rec., 174).

IX.

The Circuit Court erred in admitting evidence tending to show that on October 1, 1897, the plaintiff was negotiating with the Shepard Morse Lumber Co. for the loan of $25,000 to the plaintiff, to be secured by a mortgage upon plaintiff's mill and boards thereafter to be manufactured, and for the purchase of boards at the rate of 1,000,000 feet per year for a period of three years at the then existing market price, and the Court of Appeals erred in not sustaining the assignment of error on this point.

The admission of this evidence was made the basis of the seventh exception (Rec., 182), and of the 7th assignment of error in the Court of Appeals.

X.

The Circuit Court erred in permitting the plaintiff to prove over defendant's objection that during the time the mill was under attachment it employed four watchmen to watch the mill, whom plaintiff paid $75.00 per week.

The admission of this testimony was the basis of the defendant's 13th exception (Rec., 184), and 14th assignment of error in the Court of Appeals (Rec., 173).

XI.

The Circuit Court erred in giving the jury the following charge:

"Another point is the damages claimed for salaries of the officers and employees of the Bucki Company for the time of their enforced idleness, that is, the time they continued on salaries, and on account of the granting of the writs of attachment, were suspended from active operations. You have heard the testimony upon that, and you will determine just how far the Bucki Company suffered in damages on account of the time that their employees were compelled to remain idle and earned nothing, although they were on wages."

And the Court of Appeals erred in not sustaining the assignment based on this charge. This charge was the basis of the 21st exception (Rec., 193), and of the 24th assignment (Rec., 175).

XII.

The Circuit Court erred in refusing to give the following charge at defendant's request:

"The jury are instructed that the inquiry in regard to the loss of time by the employees shall be limited to the period between October 1, 1897 and October 11, 1897, and that no damages can be allowed for any time lost after October 11, 1897."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. The refusal of this charge constituted the 22d exception (Rec., 194), and the 25th assignment (Rec., 176).

XIII.

The Circuit Court erred in giving the jury the following charge:

"The giving of the forthcoming bonds did not discharge the lien of the attachment upon the property attached, and the plaintiff, after obtaining possession of the logs and lumber, could not sell and dispose of the same and give a good title to the purchaser, free and clear of the attachment liens without assuming any risk

of the property being demanded or damages being entailed."

And the Court of Appeals erred in not sustaining the assignment of error based on this point. The giving of this charge was made the basis of the 28½ exception (Rec., 202), and of the 32d assignment of error in the Court of Appeals.

XIV.

The Circuit Court erred in giving the jury the following charge:

"After the giving the forthcoming bonds for the personal property, to-wit, logs and lumber levied on, the plaintiff held such property as bailee for the sheriff, and was bound to deliver such property back into the sheriff's possession whenever such sheriff demanded the possession of such property for the purpose of enabling the sheriff to sell the same to satisfy any judgment the Court might render in the attachment suit."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge constituted the basis of the 29th exception (Rec., 202), and of the 33d assignment of error (Rec., 178).

XV.

The Circuit Court erred in giving the jury the following charge:

"If the plaintiff sold such property after giving such forthcoming bonds in contemplation of law, the plaintiff held the proceeds in its hands, and had the legal right to hold such proceeds in its hands to pay any judgment that might thereafter be rendered against it in the suits in which the attachments were issued, until such lien of the attachment ceased to exist."

And the Circuit Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 30th exception (Rec., 203), and of the 34th assignment of error in the Court of Appeals (Rec., 178).

XVI.

The Circuit Court erred in giving the jury the following charge:

"The Court instructs you to award damages to the plaintiff which it sustained by reason of or in consequence of the levy of the attachments upon all the timber and lumber and logs, and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber, lumber and logs, considering any deduction from such damages from the fact that the forthcoming bonds or indemnity bonds were given by the plaintiff."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 31st exception (Rec., 203), and of the 35th assignment of error in the Court of Appeals.

XVII.

The Circuit Court erred in giving the jury the following charge:

"It is your province and duty to determine, under the evidence, the length of time these attachment liens remained upon and continued operative upon the property attached."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 32d exception (Rec., 203), and of the 36th assignment of error in the Court of Appeals.

XVIII.

The Circuit Court erred in sustaining the plaintiff's objection to the following question propounded by the defendant to Charles L. Bucki, president of the plaintiff company:

"Q. What application was made of the proceeds of this lumber that was sold from the mill after October 1, 1897?"

The purpose of the question being to show that the plaintiff made use of the proceeds of lumber immediately

on its receipt, and that plaintiff was not embarassed in its use by reason of the forthcoming bonds.

And the Court of Appeals erred in not sustaining the assignment of error based on the exclusion of this evidence. This ruling of the Court was the basis of the 14th exception (Rec., 185), and of the 15th assignment of error in the Court of Appeals (Rec., 173).

XIX.

The Circuit Court erred in permitting the plaintiff to prove over defendant's objection that on November 4, 1897, it executed a mortgage on its mill plant to secure the Surety Company that executed the forthcoming bond, and that this mortgage was not released until June 6, 1899.

And the Court of Appeals erred in not sustaining the assignment of error based on the admission of this evidence. The admission of this evidence constituted the 10th exception (Rec., 183), and the 11th assignment of error in the Court of Appeals (Rec., 173).

XX.

The Circuit Court erred in giving the jury this charge:

"If you are satisfied in your own minds what the testimony will justify, it is not absolutely necessary for you to find a positive amount of damages if you are satisfied that such damages and such amounts have been fully proven. It is not necessary that an actual, positive amount be determined by you to a mathematical certainty or nicety."

And the Court of Appeals erred in not sustaining the assignment of error predicated on this charge. This charge constituted the basis of the 33d exception (Rec., 204), and of the 37th assignment of error.

THE EXCEPTIONS AND SPECIFICATIONS OF ERROR RAISE SIX PRINCIPAL QUESTIONS, AS FOLLOWS:

1. The liability of the surety for attorneys' fees.
2. The liability of the surety for damages due to

conjectural loss of profits, growing out of injury to credit and consequent interruption of business.

The second to seventh specifications relate to this subject and will be discussed together.

3. The liability of the surety for losses on collateral contracts (Eighth Specification).

4. The liability of the surety for wages paid during the time the mill was under the lien of the attachment to watchmen employed by plaintiff (10th specification).

5. The liability of the surety for the wages of employees of the plaintiff, whose services were lost by reason of the suspension of business. The eleventh and twelfth specifications relate to this subject.

6. Whether there is a conclusive presumption that property released on forthcoming bond is held for re-delivery to the sheriff, or else that the money arising from the sale thereof is held to meet the liability on the forthcoming bond, and that this presumption cannot be rebutted. The thirteenth to eighteenth specifications of error, inclusive, relate to this subject, and they will be discussed together.

FIRST SPECIFICATION OF ERROR.

ATTORNEYS' FEES NOT RECOVERABLE AS COSTS AND DAMAGES.

The bonds upon which this suit is brought are in the form prescribed by statute, viz:

"No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into bond, with at least two good and sufficient sureties payable to the defendant, in at least double the sum or debt demanded, conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment."

This provision was enacted by the Territorial Legislature on February 15, 1834, and appears as Section Ten in the Act of that date, and now appears as Section 1646 of the Revised Statutes of Florida (1892).

These Revised Statutes were simply a revision and consolidation of the general statutes of the state, and

they effected no change in the laws of the state, except by express provision.

Mathis vs. State, 31 Fla., 291.

Wright vs. Dressell, 140 Mass., 147.

The statute has prescribed the form of the bond, but it has not undertaken to specify the elements of costs and damages recoverable thereon. This was left to be determined by the rules and analogies of the common law which constitutes the body of the Jurisprudence of Florida.

Rice vs. R. R. Co., 1 Black., 358.

And the legislature is presumed to know what the rules and analogies of that system were.

Jones vs. Dexter, 8 Fla., 276-286.

The damages recoverable on an attachment bond for improperly suing out an attachment against property are the same that might be recovered in an action on the case for the seizure of such property without the pretense of legal authority that the writ furnishes.

Hundley vs. Chadwick, 109 Alabama Text, 105.

Hill vs. Rushing, 4 Alabama, 212.

This general statement is subject to the important modification that exemplary damages cannot be recovered on the bond.

Patton vs. Garrett, 37 Arkansas, 612.

Elder vs. Kutner, 97 California, 490.

1st Shinn on Attachment, pages 307, 664.

Drake on Attachment, Secs. 156, 175.

But no basis for the claim of exemplary damages is made in the declaration and hence it is not necessary to consider that question.

The determination of this question being dependent on common law principles, the Federal decisions should be first examined, for this is a subject upon which it is the right and duty of a Federal court to exercise an independent judgment. So spoke the Court in Railway Co. vs. Prentice, 147 U. S., 106, in reference to *exemplary* damages, and the same is no less true in regard to actual damages.

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can

be recovered, and they do not include the fees of counsel."

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HISTORY OF THE FORM OF THE ATTACHMENT BOND.

By an act adopted August 13, 1822, by the governor and legislative council of Florida, section 2, it was provided:

"That every judge or justice of the peace, before granting any attachment, shall take bond and sufficient security, of the party for whom the same may be issued, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs which may be awarded to the said defendant, in case the plaintiff, suing out such attachment, shall be cast in his suit, and all damages which shall be recovered against the said plaintiff, for his suing out such attachment, which bond shall be by the said judge or justice returned to court, with the attachment, and the party entitled to such costs or damages may thereupon bring suit and recover."

In 1834 the governor and council adopted the form now prescribed, as stated at page 19 of the brief.

ance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Text, 231; approved in Tullock vs. Mulvane, 184 U. S., Text 572.

be recovered, and they do not include the fees of counsel."

Day vs. Woodworth, 13 Howard, 370.

In Flanders vs. Tweed, 15 Wallace, 453, this Court again held that attorneys' fees are not an element of actual damages in an action of trespass. That was an action of trespass for the illegal seizure of property, in which the plaintiff sought to recover the sum of $6,000, expended by him in the prosecution of sequestration writs for the recovery of the possession of his property. That case is decisive of the precise question involved here. There, Flanders, as the result of the trespass of Tweed, found it necessary to institute sequestration suits for the recovery of the possession of his property, and in a subsequent action of trespass against Tweed, it was held that he could not recover as damages the attorneys' fees paid out in the prosecution of those sequestration suits.

In the case under consideration the Bucki Company asserts the right to recover the amount of fees paid for the services of an attorney employed to recover the possession of its property, which is the same contention made by Flanders. The fact that the action is founded on a *contract* to pay all damages can make no difference in principle. In the Flanders case the *law imposed* on Tweed the duty of paying all damages which the law recognized as elements of compensation, and in this case the Fidelity Company agreed to pay all damages which the law regarded as elements of compensation. The only difference is in the nature of the obligation from which the right springs.

The case of Oelrich vs. Spain, 15 Wallace, 211, is an instance of the aplication of this doctrine in a suit on a bond. There the condition of the bond was "to pay all costs, damages and charges that shall be occasioned by said suit."

The Court said, "We think the principle of disallowance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Text, 231; approved in Tullock vs. Mulvane, 184 U. S., Text 572.

There are two federal decisions, and only two, which relate directly to the right to recover attorneys' fees upon an attachment bond, and in both of these the right to recover such damages was denied.

The first is the case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 812, in which the Court struck allegations of special damages resulting from the payment of attorneys' fees, and held that the word "costs" employed in the statute included only the statutory docket fee.

The second is that of Jacobus vs. Monongahela R. R., 35 Fed. Rep., 395, in which the Court carefully considered the subject of the allowance of attorneys' fees on an attachment bond, and upon the authority of Oelrich vs. Spain held that they could not be recovered.

The Federal Courts have consistently refused to allow counsel fees, not merely in actions at law, but also in admiralty and patent cases.

> Arcambel vs. Wiseman, 3 Dallas, 306; The Baltimore, 8 Wallace, 377; The Margaret vs. The Connestoga, 2 Wallace, Jr., 116.

In this latter case Justice Grier expressed his strong repugnance to the allowance of counsel fees, and said that the principle seemed to belong rather to the hall of the Cadi than to the judgment seat of the Court.

The language employed in the bond excludes the idea that attorneys' fees were contemplated.

The significant words of the bond are "costs" and "damages." The word "costs" is used to signify the expenses incurred by the defendant in the attachment proceedings, and the word "damages" is used with reference to the injuries sustained from the levy upon the defendant's property.

That the word "costs" cannot be deemed to include attorneys' fees is conclusively shown by the history of legislation in Florida on that subject, and also by the well understood meaning of the word.

In 1828 the Legislature provided that "in all cases the party recovering judgment shall recover also his legal costs and charges, which shall be included in the judgment." And this provision has remained in force from that day to this and appears as Section 1304 of the Re-

vised Statutes (1892). The words "costs and charges," used in this statute during a period of seventy-five years have uniformly been construed to embrace only taxable costs, and have never been deemed to include attorneys' fees, and at no time have attorneys' fees been allowed by statute to one party against another, except in certain special proceedings brought to enforce statutory liens and recover the value of stock killed by railroads, with the exception of the period between July, 1870, and March, 1873, when what is known as the "Code Practice" was in force. It is evident that the word "costs" is used in the same sense in the attachment bond as in the Act of 1828, and that it refers only to the costs which the defendant may have taxed in his favor in the attachment proceedings. This is the generally accepted meaning of the word.

Anderson's Law Dictionary, 267.

The fees which parties have to pay counsel for asserting their rights have never been considered as costs, chargeable to the party cost.

Melancon vs. Robichand, 19 La., 357.

"The word 'costs,' when used in relation to the expense of legal proceedings, signifies the sum prescribed by law as charges for the services enumerated in the fee bill."

Apperson vs. Mut. Life Ins. Co., 38 N. J. L., 388.

"A colicitor's fee cannot be taxed as *costs* in a case."

22 Ill., 546; 47 Ill., 373.

"The term 'costs' in an agreement in relation thereto, legally signifies only the expenditures which are by law taxable, and included in the judgment, and does not include attorneys' fees." McDonald vs. Page, Wright, (Ohio) 121.

The case of Frost vs. Jordan, 37 Minnesota, 546, was an action on attachment bond to recover attorneys' fees. The bond in that case was conditioned to pay all costs and all damages in case the defendant recovered judgment. The Court denied the recovery of attorneys' fees, and among the reasons assigned for the disallowance was the interpretation put upon the terms of the bond. The Court indicated that the word "costs" was intended to

include merely the taxable costs allowed by statute (which in that State included $10.00 for attorneys' fees), ~~proceedings should be recovered on this bond.~~ The legislature intended to allow anything beyond such taxable costs on account of the expense of the litigation; and that the "damages" referred to in the bond were intended to be limited to those resulting directly from the seizure and detention of the property attached, such as loss of its use, and loss or deterioration resulting from its detention.

It is clear that the word "costs" employed in this bond includes only taxable costs, and it is equally clear that the Legislature never contemplated that any other or further expense of defending against the attachment proceedings should be recovered on this bond. The Legislative mind was directed especially to this subject and, having provided for the payment of taxable costs merely, it cannot reasonably be supposed that any other or additional expense of defending the suit was meant to be embraced in the term "damages."

"'*Expressio unius est exclusio alterius,*' is a universal maxim in the construction of statutes." U. S. vs. Arredondo, 6 Peters, 691. This maxim "is based on the rules of logic and the natural workings of the human mind." Black on Interpretation of Laws, 146.

Assuming the word "damages" to be broad enough to include the expenses of defending the suit, yet must the meaning of that word be controlled and restrained by the word "costs," which has special relation to this subject. Reiche vs. Smythe, 13 Wallace, 162; Sutherland on Stat. Con., Sec. 219.

This presumption is heightened when it is considered that at the time this statute was passed attorneys' fees were not treated as an element of damages for any breach of contract or for the commission of any tort. It is to be presumed that the damages referred to were such as could usually be recovered.

A takes B's chattel and puts him to the expense of bringing an action of trover or detinue. The verdict in the one case would be for the chattel, or its value at the time of verdict, and taxable costs, and in the other the

value of the chattel at the time of the taking, and in neither instance are attorneys' fees recoverable.

Skinner vs. Pinney, 19 Fla., 148.

A promises to pay B $100 and by a breach of his contract puts B to the expense of bringing an action of assumpsit to recover the money unjustly withheld. This action "sounds in damages," which are designed to be full compensation for the wrong done, but the recovery is limited to the principal sum due, interest by way of penalty for the delay, and taxable costs, but no attorneys' fees. So in an action of covenant for a breach of a covenant of title in a deed, no attorneys' fees can be recovered.

Leffingwell vs. Elliott, 10 Pickering, 204.

These rules of the common law existed in Florida at the time of the adoption of this statute and ever since, *and there is even less reason* for allowing attorneys' fees for the recovery of property taken under process of law, than there is for the recovery of property taken by a naked trespasser.

Patton vs. Garrett, 37 Arkansas, 613.

It is to be presumed, therefore, that the Legislature did not intend to impose a more extensive liability upon the surety on a bond than was imposed by the law in the cases referred to. It is true that there are cases where attorneys' fees may be indirectly recovered in actions of trespass, by way of exemplary damages, but no foundation has been laid for the recovery of any such damages in this action, and under no circumstances can exemplary damages be recovered in a suit on the bond.

FLORIDA DECISIONS.

In the case of Wittick vs. O'Neal, 22 Fla., 593, the Supreme Court of Florida held that attorneys' fees could be recovered on an injunction bond, conditioned to repay *all damages* the defendant might sustain. This decision was founded on what the Court was pleased to consider the weight of authority. The Court treated the question as one of general jurisprudence, and while it considered such precedents as were furnished by the decisions from other states, it did not consider the analogies fur-

nished by its own State, namely, the measure of damage in actions for trespass and for the taking and detaining of chattels, or that for breach of contracts to pay money, or to do a specific act. The bond in the case of Wittick vs. O'Neal was conditioned to repay *all damages,* etc., the word *costs* being omitted, which of itself is sufficient to differentiate that case from the case at bar. That case was decided long after the passage of the Act prescribing the condition of an attachment bond, and hence the rule laid down in that case was not in the contemplation of the Legislature when it passed the Act.

It could not be said to have entered into and become a part of the contract sued on in this case, any more than the rule for the assessment of damages in detinue and assumpsit did.

Indeed, at the time these bonds were given there was a Legislative declaration of policy on this subject which was very much more germane than the decision of Wittick vs. O'Neal; that is, the measure of damages upon a replevin bond, as prescribed by statute. The measure of damages in such cases will appear from the following quotations from the statutes:

THE MEASURE OF DAMAGES ON A REPLEVIN BOND.

In Florida a plaintiff in an action of replevin obtains possession of the goods at the inception of the suit by giving bond, "conditioned that the plaintiff will prosecute his suit to effect and without delay, and that, if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay to the defendant all such sums of money as may be recovered against him by such defendant in the said action for any cause whatsoever."

Sec. 1713, page 573, Rev. Stat. Fla.

The defendant in replevin may, at any time within three days after the levy of the writ, have the property restored to his possession by giving bond, "conditioned to have the property forthcoming to abide the result of the suit."

The statute prescribes the nature of the judgment to be recovered by both the plaintiff and defendant in replevin as follows:

Sec. 1724. Judgment for Plaintiff:

1. When goods were not delivered to defendant, if it shall appear upon default of the defendant, or upon trial, or otherwise, that the goods described in the declaration were wrongfully taken * * and said goods shall have been delivered to the defendant by the officer executing the writ, the plaintiff shall have judgment for his damages caused by the taking and detention, and for his costs of suit."

"2. When goods are re-delivered to defendant upon his forthcoming bond, the plaintiff shall take judgment for the property itself, and against the defendant and the sureties on the forthcoming bond of the defendant, *for the value of the property*, such judgment to be satisfied by the recovery of the property, or the amount adjudged against the defendant and his sureties." * *

Section 1725. Judgment for defendant:

"1. When goods have been re-delivered to defendant. When the goods have been re-delivered to the defendant upon his forthcoming bond, and it shall appear, upon the non-suit of the plaintiff, or otherwise, that the defendant is entitled to the goods, he shall have judgment against the plaintiff and the sureties on the bond for his damages for the taking of such property and for his costs."

"2. When goods have not been re-delivered to defendant. When it shall appear, as set forth in the preceding section, and the property shall not have been redelivered to the defendant, judgment shall be entered up against the plaintiff for possession of the property and costs, and against him and his sureties for *the value thereof and costs*, in the same manner as provided in Section 1724, paragraph 2, for judgment in favor of the plaintiff; and the defendant shall have the same election as is in said Section accorded to the plaintiff."

See page 576, Rev. Stat. of Fla.

These provisions were adopted prior to the rendition of the decision of Wittick vs. O'Neal, 22 Fla., 593, but codified into the Revised Statutes afterwards.

An inspection of this statute shows that *taxable costs* are the only expense of carrying on the litigation which is allowed to either party, and this is the rule invariably followed in the application of the statute.

Here is an express declaration of principle or policy against the allowance of attorneys' fees in a case where the property of a defendant may be taken at the inception of the litigation, and where the necessity for employing counsel is equally as great, and it is to be deemed of greater force than the decision in Wittick vs. O'Neal, because it was announced soon after (March 15, 1845) the adoption of the statute prescribing the form of an attachment bond, and reaffirmed in 1892 in a general revision of the laws, along with the original statute prescribing the form of an attachment bond.

A defendant in attachment may release the property upon giving a forthcoming bond, just as in replevin, and forthcoming bonds were actually given in this case.

The case of Gonzales vs. DeFuniak &c. Tobacco Co., 41 Fla., 471, was an action on an attachment bond, and was decided subsequently to June, 1899, or two years after these bonds were executed. The bond had been given for the purpose of suing out an ancillary writ of attachment to an action of assumpsit. It appeared that the action of assumpsit had been dismissed by the voluntary act of the plaintiff, and that the ancillary writ of attachment had thereby been dissolved *ipso facto*. There was evidence to show that money had been expended for the defense of the action of assumpsit, but none to show that any expense had been incurred in the defense of the attachment proceedings. The Court held that the amount expended for the defense of the action of assumpsit could not be recovered on the bond. In that connection the Court said:

"By the great weight of authority, while attorneys' fees and other expenses incurred in relation to the attachment or in procuring its dissolution will be allowed as damages in actions upon attachment bonds, the fees and

expenses incurred in defending the principal suit cannot be allowed, in the absence of statute, or of a stipulation in the bond to that effect.

Text, 477.

The Court then added:

"In disposing of the case upon the points presented, we do not want to be understood as holding that the declaration in this case states a cause of action, for under the decision of Steen vs. Ross, 22 Fla., 480, it is, to say the least, doubtful whether any breach of the attachment bond is alleged."

It appears that the only question before the Court in this case was the liability for attorneys' fees expended in defending the main action, which the Court held could not be recovered, and that the Court was careful to say that it doubted whether the declaration stated a cause of action at all.

What was said, therefore, on the subject of attorneys' fees expended in defending the attachment proceedings proper was in no wise necessary to the disposition of the question before the Court, and was the merest dictum.

This decision would not be binding, even on the Supreme Court of Florida, and certainly is not binding on the Federal courts.

Carroll vs. Carroll, 16 Howard, 275 Text 286, 287.

Murray, &c. vs. Chicago & N. W. Ry. Co., 92 Fed. Rep., Text 870.

By Section 1327 of the Revised Statutes of Florida, the judge who writes an opinion is required to prepare "a syllabus or statement of the points or principles intended to be decided by the Court," and in the case under consideration, it is stated in the syllabi that "attorneys' fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in actions upon attachment bonds."

The opinion expressed on the subject is none the less a dictum for all that, for in Hart, et al., vs. Stribling, 25 Fla., 435, the Court says:

"Where the judge who writes the opinion of the Court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point is an arbiter dictum and is binding upon no one."

Neither in the case of Wittick vs. O'Neal nor in that of Gonzales vs. Tobacco Co. does the Supreme Court of Florida treat this question as one of statutory construction, or of local law, but as one of general jurisprudence, to be determined according to principles of common law relating to the subject of damages. And it is to be noted that in the last mentioned case the Court gives no attention to the language of the bond prescribed by the statute, or to the analogies of the law in force at the time the statute was adopted. Consequently neither case presents an instance of statutory construction, and this court is not bound by them.

In the case of Venice vs. Murdock, 92 U. S., 501, this Court said:

"It is argued, however, that the New York decisions are judicial constructions of a statute of that State, and that, therefore, they would furnish a rule by which we must be guided. The argument would have force if the decisions in fact presented a clear case of statutory construction, but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute. They assert general principles, etc."

In construing statutes the Federal courts are not required to adopt a construction based on the implications of a judicial opinion.

Caesar vs. Capel, 83 Fed. Rep., 403.

"A decision by a state court that every right of action given by a statute is in the nature of a specialty, is not, when applied to a particular statute of that state, a construction of that statute which a Federal court is bound to follow, but is a ruling upon the question of general law."

Terminal Co. vs. National Bank, 83 Fed. Rep., 607, Text 611.

SUMMING UP.

First. This is a contract given in pursuance of statute. The statute is silent as to the elements of damages recoverable, and these have been left to be determined according to the principles of the common law.

Both the Florida cases referred to treat the subject of the measure of damages on the particular contracts referred to as one of general jurisprudence.

"This Court determines for itself the construction of a contract, without reference to the previous adjudications of he State courts on the subject."

Pana vs. Bowler, 107 U. S., 529.

This Court should determine this question according to its own notions of the law.

Railway Co. vs. Prentice, 147 U. S., 106.

According to all the federal decisions, and all the analogies of the law existing when the form of this bond was adopted, attorneys' fees cannot be recovered thereon, and according to the statutory declaration of policy expressed in reference to the measure of damages on a replevin bond, these fees cannot be recovered.

Second. This is not a question of local law. This question does not relate to the procedure of the Court in which the bond was given, since no judgment could have been given on the bond in the attachment proceedings, and an action might have been maintained thereon in any country where the law of nations prevails, and where service could have been obtained. The subject matter of the bond is not a thing that has a fixed and local character, it is damages; and the judgment on such a bond is a money judgment.

"The judiciary act declaring local law rules of decision in Federal courts is limited in its application to laws strictly local, to the positive statutes of a state, and the construction thereof adopted by local tribunals and to rights and titles to things having a permanent locality, and does not extend to contracts and other instruments of a commercial character."

Swift vs. Tyson, 16 Peters, Text, 18, 19.

"The decisions of courts do not constitute laws within the meaning of the 34th Section of the Judiciary Act, they are at most only evidence of what the laws are, and are not themselves laws."

I. D., 18.

"This Court does not follow the State courts in their construction of a will or any other instrument, as they do in the construction of statutes."

Lane vs. Vick, 3 Howard, 476; approved in Barber vs. Pittsburg &c. Railway Co., 166 U. S., 100.

The fact that the contract or bond was given in pursuance of statute can make no difference.

Blackburn vs. Portland Gold Min. Co., 175 U. S., 571.

Fla. C. & P. R. R. Co. vs. Bell, 176 U. S., 321.

DeLarmar's Nevada Gold Min. Co. vs. Nesbitt, 177 U. S., 523.

Provident Sav. L. Assur. Soc. vs. Ford, 114 U. S., 635.

The adoption of such a criterion would result in the abdication of the right of independent judgment in much the greater class of cases in which the Federal courts exercise jurisdiction. Since all manner of instruments, including deeds, wills and negotiable instruments are dependent as to their legal existence and form upon statutes.

Second. Assuming the question to be one of local law, yet it is the duty of the Court to exercise an independent judgment, because of the fact that the Florida Court had not, prior to the execution of these bonds, passed upon the right to recover attorneys' fees as damages on an attachment bond.

"When contracts and transactions have been entered into under and rights have accrued thereon under a particular state of the decisions, or *where there has been no decision of the State tribunals,* Federal courts properly *claim the right to adopt their own interpretation of the law applicable to the case, although a differ-*

ent interpretation may be adopted by the State courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S. Text, 33, 34.
Pleasant Tp. vs. Ins. Co., 138 U. S. 67, Text 72.
Hotel Co. vs. Jones, 116 Fed. Rep., Text 798, (6th Circuit).

As already pointed out, Wittick vs. O'Neal, 22 Fla., 593, did not amount to a determination of this question.

The rule announced in that case was no more applicable than the rule prevailing in detinue, trover or assumpsit, and *not so applicable as the rule declared by statute in relation to the measure of damages on a replevin bond.*

Gonzales vs. DeFuniak Havana Tobacco Co., 41 Fla., 471, was decided subsequently to June, 1899, and after the Circuit Court had passed on this question adversely to the Bucki Company by striking the allegations relative to attorneys' fees from the declaration (Rec., 161). (The allegations were afterwards restored to facilitate the presentation of the question to the Appellate Court.)

And, moreover, as already shown, what was said on the subject of attorneys' fees in that case was a dictum.

Third. Almost immediately after these attachments were sued out, the Bucki Company removed the attachment suits into the Federal courts, and upon the dissolution of the writs, that company became entitled to have taxed in its favor the attorneys' fees allowed by Act of Congress.

Upon the dissolution of the writ for $75,000, costs to the amount of $415.00 were taxed for the Bucki Company, and included in that amount was the usual docket fee for the attorney.

Assuming the question to be one relating to the practice of courts, the removal of the attachment suits in the Federal court brought the subject within the purview of the Federal statute, and only such fees as are thereby allowed may be recovered.

Flanders vs. Tweed, 15 Wallace, Text 452.
U. S. vs. Treadwell, 15 Fed. Rep., 532.

4. Aside from the merits of the general proposition already discussed, there are peculiar reasons in this case why the plaintiff should not be allowed counsel fees for securing the release of the property attached, as follows:

(a) The personal property was released from the attachment from forthcoming bonds and the sum of seven hundred and fifty dollars ($750.00), representing the cost of giving the bond for one hundred thousand dollars ($100,000.00), was recovered from this defendant in this suit, and the plaintiff was not put to any expense for giving the other forthcoming bond (Rec.,183).

(b) There were two common law actions, one in which $15,000 damages were claimed, and in which an attachment for $9,980.00 was issued, and another for $200,000 damages, for which an attachment for $75,000 was issued. The smaller attachment was dissolved on November 1, 1897, for errors appearing upon the face of the paper. Thereafter, on the application of the Bucki Company, the two common law actions were consolidated, and pleadings were filed as to the debt or sum demanded, which, under the Florida practice, were applicable to the attachment proceedings as well as to the common law action to which they were ancillary.

Weston vs. Jones, 41 Fla., 241.

Prior to the 20th of January, 1898, the pleadings had been fully made up (Rec., 114, at top), and the common law action could have been tried at the same time as the motion to dissolve the attachment for $75,000, and upon the same pleadings.

Weston vs. Jones, 41 Fla., 241.

At this stage of the proceedings, the Bucki Company moved the Court for a separate trial of the motion to dissolve the attachment upon the pleadings as they stood, and for the postponement of the trial of the common law action to the Spring term (Rec., 114). The Court granted this motion and directed separate trials to be had (Rec., 114). The motion to dissolve the attachment was tried on the formal pleadings (Rec., 114), and the attachment was dissolved upon the ground that the Atlantic Lumber Company was itself, on October 1, 1897, in default in respect to the performance of the written contract, and

could not on that day maintain a suit against the Bucki Company for prospective profits on account of the breach thereof (Rec.,114).

It is an established fact that had the common law action or suit on the merits been tried at the same time as this motion to dissolve the attachment, judgment would have resulted for the Bucki Company on that cause on those counts to which the attachment of $75,000 was applicable (Rec., 114), and it might have been so tried under the Florida practice.

Weston vs. Jones, 41 Fla., 241.

While the Court in form postponed the trial of the common law action, it was in point of fact when he tried this motion to dissolve the attachment upon the formal pleadings, trying the same issues that were involved in those counts of the common law action to which the attachment was applicable; and the ground upon which he dissolved the attachment was necessarily an adjudication that the Atlantic Lumber Company could not maintain an action of any kind upon the cause of action set up in those particular counts. The Atlantic Lumber Company subsequently recognized this situation at the trial of the common law action, by merely offering to prove what it had proved at the trial of the motion to dissolve the attachment, and the Court, presumably on the ground that it had already adjudicated the question on the merits, ordered judgment for the Bucki Company on those particular counts (Rec., 133).

The result was that the services of the attorneys who represented the Bucki Company in connection with this motion to dissolve the attachment, secured an adjudication, which not merely defeated the attachment, but also the common law action to which the attachment was ancillary, and if it should be permitted to recover the fees of counsel, it would be in a better position, in so far as counsel fees were concerned, than it would have been had no attachment been issued. According to those authorities which recognize the right to recover counsel fees on attachment bonds, all the services rendered in defense of the attachment proceedings must have been ca-

pable of separation from those which would have been incurred in the defense of an action in any event.

1 Sedgwick on Damages, Sec., 237.

Moreover, the Bucki Company having demanded a separate trial of the motion to dissolve the attachment, when the matter could have been disposed of in connection with the trial of the common law action, it is estopped to demand that the Atlantic Lumber Company should pay counsel fees for conducting the trial in addition to the other costs of suit. If a party either wantonly or for the purpose of furthering its own interests, unnecessarily imposes costs and trouble for twice trying the same issue, it should not receive award for such conduct. It is reasonable to presume that the Bucki Company asked for a separate trial in order to lay a basis for the claim of counsel fees.

II.

SECOND, THIRD, FOURTH, FIFTH AND SIXTH SPECIFICATIONS OF ERROR.

All of these specifications relate, in effect, to the right to recover profits lost on account of injury to credit.

The Court permitted the plaintiff to prove the profits it had been making out of its business prior to October 1, 1897 (Second Specification).

It instructed the jury that *it was a question of fact for them to determine whether the plaintiff would have been financially able to continue in business had these attachments not been levied, and if they should find it could have done so, "to award such damages as they felt convinced the plaintiff had sustained"* (Third Specification).

The Court told the jury, too, that they were "the exclusive judges of the effect of the writs of attachment upon the business of the plaintiff" (Fourth Specification).

Also that they "were the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequences of the issuing of the attachments," and that one of these consequences was all damages caused by the interruption of plaintiff's business,

either by disabling plaintiff to operate its mill, or by disabling plaintiff to deliver timber and lumber it had agreed to deliver (Fifth Specification).

The Court likewise instructed the jury that it was their "province and right to decide, from the evidence, whether the writs of attachment prevented the performance of any contract with Shepard, Morse & Co. for the loan of money or delivery of lumber, and the damages sustained by the plaintiff for such non-delivery" (Sixth Specification).

The Court likewise refused to instruct the jury at defendant's request, that they should allow plaintiff no damages on account of its inability to fill orders, if such inability was due to the fact that plaintiff was unable *to buy the logs* from which to cut the lumber (Seventh Specification, Rec., 193).

And in another place the Court instructed the jury that it was their "*province and duty to determine the length of time the attachments* remained operative on the property attached" (Seventeenth Specification, Rec., 203).

It was established by the evidence that the mill was never taken out of plaintiff's possession (Rec., 186).

That the logs and lumber sustained no injury while in the sheriff's possession, and that they were shortly after seizure redelivered to plaintiff (Rec., 186). Also that the lumber was sold by plaintiff and applied on its orders as far as it would go (Rec., 187). There was no evidence to show that it sold for any less than it would have sold for had no attachments been levied (Rec., 187); that the market price of lumber advanced after October 1, 1897 (Rec., 187); and that the parties with whom plaintiff had contracted to sell lumber stood ready to accept it long after November 16, 1897, the date upon which the mill finally closed down (Rec., 192, 20th exception).

It is stated in the bill of exceptions that these facts are *established*, and indeed they are not disputed.

Consequently the plaintiff lost no profits on the logs and lumber seized, or suffered any damage on account of the deterioration of this property. Its business did

not suffer on account of the seizure of the mill, because that was not taken out of its possession.

To what cause then did these charges refer, as the source of the loss of profits, since no loss was sustained on the stock on hand, and the possession of the mill plant was not interfered with? The answer made is, "The plaintiff's credit was injured by the attachment, and as the result of this injury to credit, plaintiff was unable to put itself in a position to supply its mill with logs, so as to continue in business."

The Bucki Company's position is this: Had these attachments not been levied we might have borrowed the money necessary to go into the logging business, as an auxiliary to our mill business, and we might have made profits under those new conditions. This, then, was the wide field of speculation upon which the jury was directed by these charges to enter.

Prior to October 1, 1897, the plaintiff had a constant and regular supply of logs at the rate of 2,000,000 feet per month, and at a fixed price, but on that day this contract was cancelled, and the log supply cut off. The mill was operated until all the logs on hand on October 1 were used up, and on November 16, 1897, it closed down for want of logs to saw. It appeared, from the testimony introduced by the Bucki Company, that it would have been necessary to make an investment of from $150,000 to $250,000 in order to supply the mill with logs (Rec., 87). Notwithstanding this, the Court refused to strike out the testimony relative to the profits made prior to October 1, 1897, profits which were made under entirely different conditions from what would have confronted plaintiff in the future, and the jury was permitted to consider that evidence as a basis for estimating what the plaintiff might have made in the future, when undertaking to supply itself with logs.

And, notwithstanding the plaintiff was shown to have no credit on October 1, 1897, and notwithstanding that the Atlantic Lumber Company on that day commenced two common law actions against it, claiming damages to the amount of $200,000, the jury was directed to consider the effect of these attachments on plaintiff's

credit, to separate the effect of the actions at law on that credit from that of the attachments, and to speculate whether plaintiff would have been *financially* able to continue in business and to make a profit, if these attachments had not been issued.

It is true that the Trial Judge told the jury that he had struck out the evidence relative to what the Bucki Company might have made in future by continuing in business (Rec., 192), but that testimony had been heard by the jury and these instructions directed them to assess damages for injury to business, and left them to determine for themselves the length of time the liens continued on the property. Under these circumstances the general charge of the Court was a vain act, and by giving these charges he nullified his action in striking out certain testimony.

And the Trial Judge refused, at defendant's request, to charge the jury that the Bucki Company could recover no damages on account of its inability to purchase the logs from which to cut orders for lumber (Seventh Specification, Rec., 175).

There are two reasons why the Court should have excluded from the consideration of the jury the question of injury to business and loss of profits through injury to credit:

First. Because no *facts* were proved which tended to show that the Bucki Company would have been able to borrow the funds necessary to carry on its business had these attachments not been levied, as their ability to do so was, under the evidence, a matter of mere speculation or conjecture, and because such damages were too remote.

Second. Because there were no facts proved which would have enabled the jury to determine with any degree of certainty that profits could have been earned, even though the necessary funds to carry on the business had been procured.

These propositions will be discussed in their order.

FIRST PROPOSITION.

H. W. Simmons was the financial manager of the Bucki Company. He testified that its credit was bad in August and very bad in September. That on October 1, 1897, it was necessary for the company to have had a loan of $25,000 in order to have gone on in business at all, and that it must have had a loan of $50,000 in order to have gone on successfully (Rec., 188). And it must be borne in mind that this estimate was on the assumption of the continuance of the delivery of logs by the Atlantic Lumber Company under the contract between it and the Bucki Company.

After the rescission of that contract it would have been necessary for them to have made an additional investment of $150,000 to $250,000 in order to supply the mill with logs, as shown by their own testimony (Rec., 87).

There was no evidence showing, or tending to show, that in case the attachments had not been levied, the Bucki Company could have obtained the money necessary to put itself in a position to supply the mill with logs—and indeed the testimony almost conclusively established that it could not have done so. There was testimony to the effect that there were negotiations pending between Shepard, Morse & Co. and the Bucki Company for a loan of $25,000 from Shepard, Morse & Co., to be secured by a mortgage on the mill and the first-class boards then in the yard, the loan to be paid by the shipment of the boards. This was no more than a sale of the boards, the purchase money being paid in advance. And the boards were sold after the attachment for as much or more than Shepard, Morse & Co. had agreed to pay (Rec., 187), so that no disadvantage was sustained from the loss of that loan. This amount, if it had been obtained, would have been entirely inadequate.

It would have been impossible for a jury to determine with certainty that the necessary funds could have been obtained had no levy been made, and it would have been a matter of pure conjecture. It would have depended upon whether a person having money to lend could be found, the faith of a possible money lender in the Bucki

Company's ability to pay, and in the adequacy of the security offered. All of this was so much a matter of uncertainty, and of individual taste on the part of the lender of money, that no one could have said what the result would have been.

"Loss of credit or custom generally involves the intervention of the will of strangers, and it is therefore generally remote. Thus, in a case of wrongful attachment, no compensation is allowed for loss of credit."

1 Sedgwick on Damages, Sec. 127.

In Elder vs. Kutner, 97 California, 490, 32 Pac. Rep., 563, it is said:

'The liability of defendant arises under their contracts, and is limited to its terms and conditions. By that contract they did not undertake to become liable for the remote and possible consequences which in some contingency might follow, but for the proximate consequences, naturally and ordinarily resulting from the effect of the writ. The impairment of plaintiff's credit, the inability to sell lands levied on, or to contract a loan upon the security of such land was not a proximate, but a remote, consequence of the attachment."

In Union Nat. Bank vs. Cross, 100 Wis., 174, an attachment was levied on a sawmill plant and the business stopped. The Court held:

1. That in such a case there could be no recovery for injuries to credit, reputation or business, as such damages were too remote and speculative.

2. That in case of a wrongful levy upon a stock of goods kept for sale, which were afterwards returned to the owner, he may recover as part of the damages any depreciation in the value of his goods during the time they were held, the reason being that the goods are kept for the purpose of sale, and had they not been seized, they might have been sold for their value when seized; hence the depreciation in value may be said to be a reasonable and certain element of damages. But when property kept for use and not for sale is attached, the reason no longer holds good, because there is no presumption that the property could or would have been sold, but the presumption is to the contrary, and that the

proper measure of damages in such a case was the value of the use of the mill, its rental value, while held in the possession of the officer, and any injury, wear and tear or negligent care while in the officer's possession. The measure of damages to sawmill property and fixtures by reason of wrongful attachment, is the loss of its use or rental value, and not the injury to business, credit and reputation resulting from bankruptcy caused by the attachment.

"It is the general rule that the depreciation to real property upon which an attachment has been levied, which occurs while the levy remains in force, if there be no change of possession, is not the immediate result of the attachment, and recovery therefor cannot be had of the attaching creditor."

Reasdale vs. Major, 106 Iowa, 1.
See also Marx vs. Strauss et al., 93 Ala., 453.
Shinn on Attachments, page 694.
Gerard vs. Moore, 24 S. W. Rep., 652.

SECOND PROPOSITION.

The Bucki Company's position is: "Had we possessed sufficient credit, we could have borrowed the money necessary to continue in business, and had we continued in business, we could have earned a profit out of our business." A possibility upon a possibility. Let it be supposed that the evidence was sufficiently definite to have enabled a jury to find that the necessary money could have been borrowed, for the purpose of inquiring whether there was such evidence of the ability of the Bucki Company to earn profits, as would have justified the submission of this question to a jury, ~~then it can be demonstrated that the Bucki Company could not have earned such profits.~~

Prior to October 1, 1897, the Bucki Company had a steady supply of logs of a definite quality and quantity, and at a fixed price. Subsequently it could not have supplied its mill with logs without going into the logging business on its own account. The result of its business as a whole would have, of course, depended upon the success of this auxiliary business, and its success in that was

dependent on a great variety of circumstances, such as cost of logging plant and equipment, cost of timber lands, quality of timber, the management of the logging business, the seasonableness of the weather, logging business being a business carried on in the open air, and a variety of circumstances too uncertain to be calculated upon, and no facts were shown in the testimony which tended in the least to remove the uncertainty.

In the case of Cushing vs. Seymour, 30 Minnesota, 301, the Court distinguished the previous decision of Goebel vs. Hough, 26 Minn., 252, and held that damages growing out of the loss of the use of a threshing machine were too remote to be recovered. The Court said: "Threshing is conducted in the open air, and subject to contingencies of weather, breakages, delays, condition and quality of grain and state of roads, skill and energy in operating the machine, which make it impracticable definitely to ascertain what the profits of performing particular threshing contracts will be, in the absence of actual experiment in the particular instance."

This decision applies with peculiar aptness to this case, and tends to illustrate it. But leaving out of view the difficulties of the logging business, what certainty was there that the lumber manufactured at the mill could be disposed of, and if disposed of, that it could be disposed of at profitable prices? The Bucki Company offered in evidence a contract with the Yellow Pine Company, by which it bound itself to take a large part of the lumber manufactured by the Bucki Company during the year of 1897 (Rec., 182).

But it will not be contended that the Bucki Company during 1897 could have put itself in a position to place lumber on the market, gotten out with its own equipment and from its own forests. There was no testimony showing how long it would have taken the Bucki Company to procure timber lands, secure necessary logging equipment, and organize the business, so as to place itself in a position to get out logs. Charles L. Bucki admitted that it would have taken sixty days at least to have prepared and organized a force and equipment alone (Rec., 82), so it is apparent that, even though the Bucki

Company had set about preparing to supply itself with logs immediately after October 1, 1897, it could not have commenced to put in logs prior to January 1, 1898, and afer that date it would have had to seek customers, and it might or might not have found them. The experience of Stockton, who leased the mill from February 22, 1898, to February 22, 1899, and who operated it at a loss of $18,000, illustrates the uncertainty of the situation (Rec., 105).

The following long list of authorities deny the right to recover for injury to business:

The case of Bates vs. Clark, 95 U. S., 204, was an action of trespass against an army officer for the illegal seizure of a lot of whiskey, part of plaintiff's stock in trade, the plaintiff being at the time engaged in a general mercantile business, and in that case the Court held that the measure of damages was the difference between the value of the goods so seized at the time and place where they were taken, and at the time and place where returned to the plaintiff. Text 210.

In Coulson vs. Bank, 54 Fed. Rep., Text 859, which was also an action of trespass for the illegal seizure of personal property, this Court said:

"The measure of damages for the unlawful seizure, without malice, of personal property, where the property is subsequently returned to the owner, is the difference between the value of the goods at the time and place of the unlawful taking and at the time and place when returned, in addition to the value of the use during the time of detention."

The case of Watson vs. Sutherland, 5 Wallace 74, was a suit in equity to restrain the threatened illegal levy of a writ of attachment upon the complainant's stock in trade, and the Court granted the relief on the ground that an action of trespass against the marshal or the attaching creditors would be an inadequate remedy. The bill, it is to be observed, alleged that the complainant had established a profitable trade. The Court used this emphatic and unqualified language in its opinion:

"If the appellants made the levy, and prosecuted it in good faith, wihtout circumstances of aggravation, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or if sold, to the value of it when taken, with interest from the time of taking down to the trial. And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. Loss of trade, destruction of credit and failure of business prospects are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law."

In North vs. Peters 138 U. S., 271, the Supreme Court granted similar relief on the same ground.

The case of Watson vs. Sutherland, *supra*, is quoted with approval by the Supreme Court in the recent case of Vance vs. Vandercock Co., 170 U. S., Text 480.

The case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 811, is the only Federal authority which I have found where damages to credit were claimed in an action on an attachment bond. In that case the complaint alleged that the plaintiff's property, consisting of five houses and a store, in which plaintiff was engaged in doing business as a merchant, were attached under the writ of attachment, whereby plaintiff was put to great expense, and his credit as a merchant injured, etc. On motion, the Court struck out the allegations in regard to injury to credit. Text 812.

Probably the leading case bearing on this subject is that of Howard vs. Stillwell & Bierce Mfg. Co., 139 U. S., 203, in which it was held that loss of profits for breach of a contract could not be recovered, because not in the contemplation of the parties, and because too remote, conjectural and uncertain.

This case will be referred to again in connection with the testimony which the Bucki Company offered for the purpose of establishing the amount of its damages.

The text books are unanimous in holding that damages to business and loss of profits cannot be recovered in a suit on an attachment bond.

1 Sedgwick on Damages (8th ed.), Sec. 127.
1 Sutherland on Damages (2d ed.), Sec. 55.
2 Id. (2d ed.), Sec. 515.
Drake on Attachment, Secs. 175, 179, b.
1 Shinn on Attachment, p. 342.
Wade on Attachment, Secs. 300, 301.
2 Sedgwick on Damages (8th ed.), Secs. 682, 436.

The decisions of the State courts are almost unanimous in holding that damages to credit and business, and loss of profits cannot be recovered as the following citations will show:

The case of Thompson vs. Webber, 4 Dakota, 240, was an action upon an attachment bond, to recover damages for an attachment improvidently sued out against the plaintiff's property, and damages for injury to business and credit were sought to be recovered therein against the obligors upon the bond. And this case is worthy of especial note as the doctrine of Watson vs. Sutherland was applied. The lower Court admitted evidence in regard to the effect of the attachment upon the business of the plaintiff, which the Supreme Court held to have been error, and in that connection it said

"This is an action brought against the defendants upon an undertaking express in its terms, by which the obligors undertake to pay to the plaintiffs all costs that may be awarded to them, and *all damages that they may sustain by reason of the attachment.* As to the sureties, at least the undertaking must receive a strict construction. They cannot be held beyond the letter of the contract. They have contracted to pay these plaintiffs 'all damages that they may sustain by reason of the attachment.' The words themselves are broad enough to include every conceivable damage that might accrue to plaintiffs by reason of the attachment, but they must

have a reasonable construction. We need not, however, examine the decisions of the Courts for a construction of this language. Our Code, following the common law as to the damages flowing from the breach of such an obligation, has set at rest any argument that might be made to the contrary; and say Secs. 1947, 1948, Civil Code (old ed.), page 456:

"For the breach of an obligation arising from the contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

"No damages can be recovered from a breach of contract, which are not clearly ascertainable, both in their nature and origin.

"Under the terms of this undertaking the plaintiffs were entitled to such damages as would compensate them for the detriment proximately caused by the attachment, or such as would naturally result therefrom. Would the breaking up and ruin of one's business be the proximate and natural result of attaching property? It is safe to say that no well considered case has so held. On the other hand, the decisions and text writers lay down the contrary rule."

In a well considered case in the Supreme Court of the United States, Watson vs. Sutherland, 5 Wallace, 74, in which that Court sustains an injunction against an officer, restraining him from closing up the place of business of the plaintiff, on the ground that an action at law would be inadequate to compensate for loss of credit and the breaking up of his business, Judge Davis, in delivering the opinion of the Court, says: (Quoting the opinion given above.)

The case of Herd vs. Barnhart, 53 Cal., 97, was that of an action upon an attachment bond to recover damages for the illegal seizure of the defendant's wagons, horses, cows and other personal property, and it was alleged that the defendant in the attachment suit was at the time of such seizure engaged in the dairy and farming business with this property, and that the business

was interrupted and prevented by the seizure of such property in question. The Court below gave the following instruction:

"What the use of the property was worth to him during the time he was deprived of it by the writ of attachment is the measure of damage, and in ascertaining the value of such use, you will take into consideration the use he had for the property so attached, and how he could and would have used it, if it had not been taken from him."

The Supreme Court reversed the judgment of the Court below, on account of this charge, and in passing upon the question, said:

"The Court charged that the measure of damage was what the use of the property was worth to the plaintiff during the time he was deprived of it, and that in ascertaining the value, the jury should consider how the plaintiff could and would have used the property, had it not been taken from it. This was substituting a speculative and a peculiar measure of damages for the true rule, which, as applied to the case, was what the use of such property could have been procured for—in other words, the market value—and was erroneous."

I have not had an opportunity to examine the statutes of Alabama and Tennessee, but it appears from Mr. Sedgwick that an exceptional rule exists in those states by force of statutes, in those cases where an attachment is maliciously sued out. Thus, at Section 683, this author says:

"Under the Alabama and Tennessee statutes, if the wrongful attachment be malicious, injuries to credit and business and exemplary damages may be recovered in an action on the bond. The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for the wrongful or vexatious suing out of the writ."

To the same effect see the opinion of Judge Hammond, in Jarman vs. Stewart, 12 Fed. Rep., 268, where the statutes of Alabama and Tennessee are compared.

In Traweek vs. Martin Brown Company, 79 Texas, 460, the Court says:

"As we understand it, it is not for the mere issuance of the attachment that damages in the case are given. When the facts do not exist which warrant the writ, and the property of the defendant is seized, all loss directly and proximately resulting to him from the seizure of the defendant's property is recoverable as actual damages. Such damages are confined to the depreciation or loss to the owner of the goods seized, and to the loss resulting from the sacrifice at a forced sale. This was the rule laid down in Wallace vs. Finberg, 46 Texas, 35, and has ever since been rigidly adhered to in this court. A levy upon real estate, under our statutes, not being attended with any disturbance of the possession, use or enjoyment of the premises by the owner, it follows that as a general rule such a levy can afford no ground for the recovery of actual damages. Counsel for appellant, who have filed an elaborate brief and argument, have cited no case in which such a recovery has been allowed. In two jurisdictions the contrary has been held. Heathe vs. Lent, 1 Cal. 410; Brandon vs. Allen, 28 La. Ann., 60."

The Court then intimated that if it could have been shown that an advantageous sale had been prevented by the attachment, and the property had subsequently depreciated, a recovery of damages might have been sustained.

In Kirbs vs. Privone, 78 Texas, 353, the Court held that loss of business was not an element of actual damages for improper attachment, and could only be recovered where exemplary damages were permissible.

Railway Co. vs. Joachim, 58 Texas, 457.

In Wallace vs. Finberg, 46 Texas, 35, it was held that damages to credit were not recoverable.

In Seattle Grocery Co. vs. Haley, 6 Washington, 302, the Court held that damages for injury to credit could only be recovered as exemplary damages, and not as actual damages on an attachment bond. In this case the Court comments upon Meachem vs. Kennedy, 18 Fed. Rep., 312, which follows Donnell vs. Jones, 13 Ala., 490, Meyer vs. Fagan (Nebraska), 31 N. W., 753, and MacVeagh vs. Bailey, 29 Ill., App., 606, as the only authorities to the contrary, and remarks that the only thing

before the Court in the last two cases mentioned was whether the damages assessed were excessive, and that there was no discussion of the subject of damage to credit in either case.

In Crymble vs. Mulvaney, 21 Colo., 203, damages were claimed for injury to credit and loss of profits growing out of the attachment of the stock in trade of an established business, it being alleged that the plaintiffs were at the time of the attachment in good credit and doing a prosperous business, and the Court held as follows:

"We think, therefore, that the sale was valid, and that the appellee, upon the testimony, was entitled to recover the actual value of the goods taken and retained, together with interest thereon, and damages for the depreciation and loss of those taken and returned, and perhaps for the loss of trade and business during the time the sheriff held possession of the building and excluded him therefrom—such loss being the natural and proximate result of that act—if competent and satisfactory proof of such loss can be made. Yet, we are clearly of the opinion that the Court below erred in submitting to the jury the question of loss of profits thereafter, and of injury to the credit of the appellee, also in submitting to them the question of exemplary damages. The loss of profits resulting from an injury to business after its resumption, and until the commencement of the action and loss of credit, are too speculative, and not allowable under the clear weight of authority."

Loss of future profits caused by seizure of the stock of a grocery store are too uncertain to be recovered.

Casper vs. Kleppen, 61 Minn., 353.

In Anderson vs. Sloan, 72 Wis., 222, in which the declaration alleged that at the time of the attachment the defendant therein was solvent and possessed a large and valuable stock of goods and a good credit, and was making a large profit, and that by reason thereof the business was broken up and ruined, etc., the Supreme Court, in reversing the lower Court, which had charged the jury to allow damages for loss of profits, said:

"If under any circumstances the jury might consider, in assessing damages, that the business and trade of the plaintiff had been injured and interrrupted by the acts of the defendants, we cannot see upon what grounds they are to be chargeable with the supposed loss of profits the plaintiff would have made after the goods had been returned to him, or how, in estimating such loss of profits, they were authorized to estimate the losses occurring within about two years after the goods had been returned to the plaintiff. Damages which are so uncertain and indefinite, and which depend mainly upon the acts of the plaintiff himself, after the defendants have ceased to have any control over his property or his acts, are of too vague and indefinite a character to be estimated by the jury."

In Brownsdorf vs. Fellner, 76 Wisconsin, 45, the Court said:

"In his instructions upon the question of damages, the learned Circuit Judge among other things instructed the jury that they might assess as damages any profits the defendant might have made upon his contracts for the sale of lumber then unfulfilled, if he was prevented from filling such contracts by reason of the attachment, and these instructions were duly excepted to by the plaintiff. It seems to us that these instructions were clearly in violation of the rule as to damages laid down in Anderson vs. Sloan, and were erroneous. The justice of the rule, as stated in that case, is illustrated by the verdict in this. Here the evidence clearly shows that the defendant was not only in embarassed circumstances when the attachment was served, but it appears that he was in fact insolvent, unable to pay his debts, and had in fact transferred nearly all, if not all, of his attachable property to a part of his creditors, either in payment of, or as security for, his debts. It also appears that he did not have on hand or under his control the means of fulfilling his contracts then made for the delivery of lumber, or that he was in a position to perform such contracts had no attachments been made. The damages which the defendant might have suffered by reason of this attachment, in not being able to fulfill his contracts,

are too uncertain, and too much a matter of mere conjecture and guess to be made the basis of the verdict of a jury. The rule laid down in Anderson vs. Sloan is in our opinion most salutary, and should be especially applied in a case like that of the kind at bar, when the evidence tends strongly to show that the defendant's business was so precarious, and his pecuniary embarassment was such before the attachment was levied, as to render it extremely doubtful whether he could have made any profits from his business, even though the plaintiff had not attached."

In a suit on an attachment bond, injury caused to the reputation of the goods attached, and to the reputation of the credit of their owner are ordinarily too remote and speculative to constitute proper elements of legal damage.

Oberne vs. Gaylord, 13 Ill. App., 30 (13 Bradw.).

Defendant in attachment cannot recover on the attachment bond for injuries to his credit, sensibilities or business; the proper remedy for such injuries being in case.

Petit vs. Mercer, 47 Kentucky (8 B. Monroe), 51.

Raider vs. Berger, id., 160.

Under the general rule that one cannot recover for remote and speculative damages, one cannot recover in an action for wrongful attachment for injury to credit.

Seattle Crockery Co. vs. Haley, 6 Washington, 302.

Damages for injury to credit and for loss of prospective profits in business are not recoverable on an attachment bond.

Holliday vs. Cohen, 34 Ark., 707.

It was held in Campbell vs. Chamberlain, 10 Iowa, 337, that in an action on an attachment bond for wrongful attachment, damages for injury to character, credit or business are too remote, and cannot be recovered. In this case the Court said:

"In such actions, the plaintiff is entitled to recover his damages of losses and expenses incurred by him in making defense to the attachment proceedings, and such

FLORIDA DECISIONS RELATIVE TO THE RECOVERY OF SPECULATIVE AND CONJECTURAL PROFITS.

"Profits that are speculative or conjectural are not generally regarded as elements in fixing damages, not because there is anything in their nature, *per se*, which demands their rejection, but because they cannot be estimated with reasonable certainty."

Hodges *v.* Fries, 34 Fla., 64, 71.

That was an action for breach of contract, and in the case of Chipley *v.* Atkinson the supreme court of Florida applied the same rule in an action of trespass on the case.

See Chipley *v.* Atkinson, 23 Fla., 206; text, 222.

losses as he may have sustained by being deprived of the use of the property attached, and any injury thereto by its loss or depreciation in value; for such losses he should be liberally rewarded. If the attachment were sued out wrongfully, then damages should be for such losses and trouble, not only compensatory but exemplary, but injury to credit or character or business are too remote and speculative to be considered in an action of this kind."

In the case of Lowenstein vs. Monroe, 55 Iowa, 82, the Supreme Court of Iowa reaffirmed the doctrine of Campbell vs. Chamberlain, and in that connection said:

"Counsel for appellee have cited to us a number of cases where it has been held that injuries to credit, loss of profits and the like are a proper source of damages. And examination of these authorities show that such is the rule in Alabama, Illinois and Kentucky. In most of the other states, the rule is in conformity with Campbell vs. Chamberlain."

In this case the defendant in attachment counterclaimed against the plaintiff, and alleged that the attachment was wrongful and malicious, and claimed damages therefor.

The case of Weeks vs. Prescott, 53 Vt., 57, was an action of trespass to recover damages for wrongful attachment. Damages for interruption of business and loss of credit were claimed in the declaration and the referee in his report said:

"Plaintiff claims that he is entitled to recover for the interruption of business and loss of credit, and, against the objection of the defendant, introduced evidence tending to show that, in consequence of the attachment of the goods in question, he was thrown out of business and lost his credit, so as to be unable to purchase goods. I find this damage to be $300, and it results solely from the interruption of plaintiff's business and loss of credit."

But the Court said:

"The claim of the plaintiff on account of interruption of business and loss of credit is wholly disallowed."

See also Hutchinson Manufacturing Co. vs. Pinch,

91 Mich., 156, 51 N. W., 930, where it was held that the proper measure of damages for prevention of use of a mill was the rental value.

See also Levinski vs. Middlesex Banking Co., 92 Fed. Rep., 455 (5th Circuit); Witherbee vs. Meyer, 155 N. Y., 446, 50 N. E. Rep., 58; Trust Co. vs. Clarke, 92 Fed., 298.

AUTHORITIES RELIED ON BY THE BUCKI COMPANY.

Anvil Mining Company vs. Humble, 153 U. S. 540.

In this case the contract gave the plaintiff the right to mine all the ore in certain levels of a mine, for which he was to be paid a specified price. The Court held that the testimony with respect to the cost of mining, and the amount of ore remaining to be mined was sufficient to furnish a reasonable basis for ascertaining each of those facts. In that case, the profits claimed were the legitimate fruit of that particular contract, and their accrual was not made dependent upon the nature of other contracts, not yet entered into, which is the condition that the Bucki Company is in in this case; for, as stated above, it had no contract for the output of its mill which extended beyond January 1, 1898. There is no similarity between that case and the case at bar.

The Conqueror, 166 U. S., ——.

In that case the Court held, in effect, that the value of the use of the yacht, that is to say, its rental value, could be recovered, but there was no question of profits involved.

There are but three states in which damages for injury to credit can be recovered in an action upon an attachment bond. Thus, in Meyer vs Fagan, 34 Nebraska, ——, 51 N. W., 753, it was so held. Birmingham Dry Goods Co. vs. Finley, 26 So. Rep., 128, Alabama, and Hundley vs. Chadwick, 109 Ala., 505, 19 So. Rep., 845, and also in Dall vs. Cooper, 77 Tenn., 576. It appears from Mr. Sedgwick, in Sedgwick on Damages, that an exceptional rule exists in the states of Alabama and Tennessee. Thus, at Sec. 683, this author says:

"Under the Alabama and Tennessee statutes if the wrongful attachment be malicious, the injuries to credit and business and exemplary damages may be recovered

on the bond. The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for the wrongful or vexatious suing out of the writ." To the same effect see the opinion of Judge Hammond in Jarman vs. Stewart, 12 Fed. Rep., 268, where the statutes of Alabama and Tennessee are compared.

The cases of Grimes vs. Bowerman, 92 Mich., 258, and Willis vs. Naylor, 24 S. W. Rep., are actions of trespass on the case.

In the case of 86 Fed. Rep., 223 no damages for injury to credit were allowed.

The cases of—

Schill vs. Brokhus, 80 N. Y., 614.
Colrick vs. Swinburn, 105 N. Y., 503.
White vs. Mosely, 8 Pickering, 358.
Allison vs. Chandler, 11 Mich., 542.
Goebel vs. Haugh, 26 Minn., 252.
Luce vs. Jones, 39 N. J. Law, 707.
French vs. Conn. R. L. Co., 145 Mass., 261.
Chapman vs. Kirby, 49 Ill., 211.

were all cases of trespass to recover damages for the interruption of an established business, *as the direct result of force applied. The question of damages to credit was not involved in either of such cases.*

Special stress has been laid by counsel upon the case of Allison vs. Chandler, 11 Mich., 542. The correct rule is laid down on the subject in Hutchinson Mfg. Co. vs. Pinch, 91 Mich., 156, where it is stated that the value of the use of the mill while it was kept idle, that is to say, the rental value of the mill, was the measure of damages, and not the profits which might have been made out of the same.

AN ATTEMPTED DISTINCTION.

A.

It is contended that the general rule does not apply where an established business is interrupted, for the reason that the profits of that business in the past furnish a proper criterion of what they would have been in the future. Assuming this to be true, the exception would not

apply in this case, for prior to October 1, 1897, the Bucki Company had a contract with the Atlantic Lumber Company, which secured to it a steady supply of logs of a specified quantity and quality, and at a fixed price, and on October 1, 1897, that supply was cut off by a cause entirely independent of the attachment, to-wit, by the rescission of that contract by the Atlantic Lumber Company on account of the Bucki Company's failure to pay for logs delivered, in accordance with the terms thereof. The occurrence of this event would have made it necessary for the Bucki Company to embark in the business of supplying its own mill with logs, if it was to continue its business. This involved the purchase of large quantities of timber lands, the purchase of logging equipment, the construction of the necessary railroad, the purchase of railroad equipment, and the operation of its new business, the result of which would have affected its entire business, as already pointed out. The result of the business conducted by it prior to October 1, 1897, therefore, would have furnished no proper standard for estimating the results of the business that might have been conducted by it after October 1, 1897, as entirely new conditions arose.

B.

There was no accurate testimony as to the result of the previous business of the Bucki Company. Assuming the result of the business conducted by the Bucki Company prior to October 1, 1897, did furnish a proper standard for determining what would have been the result of the business engaged in by it after October 1, 1897, yet the evidence by which it attempted to show the results of that previous business is entirely insufficient for that purpose. After October 1, 1897, the Bucki Company converted virtually all of its assets then on hand into money. Thus, prior to December 28, 1897, it had shipped away from the mill and sold all of the lumber on hand October 1, 1897, and all the lumber subsequently manufactured, except about two million feet of old and second-class lumber, which was, on December 28, seized under writs of attachment sued out by other creditors (Rec., 187). This lumber was sold in the usual course of business and ap-

plied upon its orders as far as it would go. There is no testimony that it was sold for any less than it would have been sold for, had no attachment been levied. The amount realized from this lumber together with the value of the two million feet of old and second-class lumber attached by other creditors, and the value of the bills receivable on hand October 1, 1897, if deducted from the amount of the indebtedness incurred by the Bucki Company in carrying on its business operations, might have furnished a means for determining whether the business was being conducted with a profit. There was evidence tending to show that the Bucki Company realized $39,385.94 gross for the lumber shipped away from the mill after October 1, 1897 (Rec., 200, 201). In order to arrive at the net amount received for this lumber it would be necessary, of course, to deduct the cost of the 400,000 feet of logs purchased after October 1, 1897, and the cost of manufacturing into lumber said logs,and the three million feet additional supposed to have been on hand Ocober 1, 1897 (Rec., 186), which would have made a net return from the lumber much less than $39,385.94. But assuming that the whole of this amount was net and that $15,000 had been actually derived from the bills receivable reputed to be good, it would have shown its manufactured products to be worth $54,385.94, and the cost of producing the same to be, the amount of its debts, $64,000 (Rec., 193), in other words, that the cost of operating the mill exceeded by $10,000 the value of the products thereof. On October 1, 1897, the Bucki Company had but $112.50 in cash (Rec., 193).

But the Bucki Company discreetly adopted a different method of proving the results of its business operations. It introduced its mill reports, and showed thereby the quantity of lumber manufactured in each month, for the nine preceding months (Rec., 173), and it produced Charles L. Bucki, the president of the Company, as a witness to testify what the net profits of that business had been in each month (Rec., 173). This kind of evidence was entirely unreliable and illegal.

Central Coke & Coal Co. vs. Hartmann, 111 Fed. Rep, 96, Text 102.

In the case of Howard vs. Stillwell & Bierce Mfg. Co., 139 U. S., 203, the Court rejected testimony offered for the purpose of proving the profits that would have been made, which, it is submitted, were much more reliable than the testimony offered by the Bucki Company as above stated. In that case the party claiming damages offered to prove that they had purchased and held on storage a sufficient quantity of good wheat to have manufactured 200 barrels of flour per day during the period of 60 days that they were idle; that the market price of the wheat during that period was from 60 to 70 cents per bushel, the cost of converting it into flour was 80 cents per barrel; that they had in their employ the necessary laborers and skilled workmen to manufacture said wheat into flour, and were equipped with fuel and water and every other essential, except the parts and pieces of the mill contracted to be furnished by the defendants. That during the period of their detention, there was a ready cash market in Texas for the kind of flour that the mill was guaranteed to make at from $5.00 to $5.50 per barrel, and that they could have sold 200 barrels per day during the said period at $5.00 per barrel, and would have realized a profit of $1.00 per barrel from the said flour.

It is submitted that this testimony would have tended to establish the claimant's damages with a great deal more accuracy and certainty than would the testimony offered by the Bucki Company. There was lacking the same element in the case of Howard vs. Stillwell & Bierce Mfg. Co. that there was in this case, namely, the certainty that customers could have been obtained for the manufactured product. They might, or they might not have purchased. The Bucki Company had no contracts for the sale of the output of its mill for the period subsequent to January 1, 1898, and not only has there been a failure to show that they could have obtained the necessary supply of logs sooner, but the evidence demonstrates that it could not have been done.

SEVENTH SPECIFICATION.

The defendant requested the Court to instruct the jury to allow the plaintiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1, 1897, if such inability was due to the fact that the plaintiff was unable to buy the logs from which to cut the lumber (20th exception, Rec., 192).

At page 187 the Record recites that the plaintiff was unable to completely fill the contracts which it had on hand on October 1, 1897, owing to the fact that it had not sufficient logs on hand from which to cut the orders and was unable to buy others.

There was only one way in which the attachments could have affected plaintiff's ability to buy other logs, and that was by the effect they had, if any, upon plaintiff's *credit*. Consequently it must follow that the charge was improperly refused. Had this charge been given, it would, to some extent perhaps, have neutralized the injurious effects of the charges just discussed.

III.

EIGHTH SPECIFICATION OF ERROR.

The plaintiff was permitted to introduce evidence tending to show that subsequent to October 1,1897, it was unable to completely fill a contract to supply a customer with lumber, and that such customer had purchased lumber on the market with which to fill out the order at a price in excess of the contract price and had *charged* the difference against the Bucki Company (Rec., 187). Upon this testimony the Court instructed the jury that the defendant was liable for all such losses, if any resulted as a direct consequence of the attachment. It was error to give this charge. It appeared that no injury was sustained through attachment of the logs and lumber from deterioration in value, and that there was no evidence to show that the property brought any less than it would have brought had no attachment been levied, and conse-

quently loss on these collateral contracts could not be recovered, and was too remote.

Vance vs. Vandercook Co., 170 U. S,. Text 480.
Burton vs. Holley, 29 Alabama, 318.
1 Sedgwick on Damages, Sec. 138.

NINTH SPECIFICATION.

The Court permitted plaintiff to introduce evidence tending to show that at the time of the levy of the writs of attachment it was negotiating for a loan, to be secured by a mortgage on its mill plant and lumber, for the purpose of showing that the consummation of this loan had been prevented by the attachment (Rec., 182). This testimony was incompetent.

Elder vs. Kutner, 97 California, 490.
Marx vs. Strauss et al., 93 Alabama, 453.

LOSS OF TIME OF EMPLOYEES.

IV.

TENTH SPECIFICATION.

The Circuit Court permitted the plaintiff to prove that, during the time the mill was under the lien of the attachment, the plaintiff employed four watchmen to watch the mill at an expense of $75.00 per week, and the defendant duly excepted to this evidence (13th exception, Rec., 184).

The lien of the attachment rested on the mill over twelve months, but during the whole of that time the plaintiff was never disturbed in its possession, and during most of that time the mill was being operated by the plaintiff or its lessee (Rec., 184).

Section 1651 of the Revised Statutes of Florida provides "that the levy of a writ of attachment shall not operate to dispossess the tenant of any lands and tenements." The testimony was improper and very injurious.

V.

ELEVENTH SPECIFICATION.

The Court permitted plaintiff to prove that at the time of the attachment it had a number of persons in its employ by the year, and that their employment dated from April 1 (Rec., 193). It also appeared that the possession of the mill was not interfered with at any time (Rec., 184). The sheriff held the logs for seven working days, and during that time the mill was not operated. At the expiration of that time the logs were restored to the plaintiff and the mill was operated at its full capacity until all the logs on hand on October 1 were sawed up, and the mill finally closed down November 16, 1897, for lack of logs to saw.

The levy of the attachment on the mill did not prevent plaintiff from operating the mill. The levy on the logs did not result in any direct damage to them, since the bill of exceptions recites that there was no evidence that they deteriorated while in the sheriff's hands, or that the lumber sold for any less than it would have sold for had no attachments been levied. The fact that these logs might have been sawed up during the seven days they were withheld by the sheriff, and the services of the employees utilized for that purpose, would not constitute a basis for the claim of the lost time of these employees, especially as the services of the employees were utilized in sawing up the logs within the year for which they were employed, for such damage, if any, was too remote.

Damages for detention of property must have respect to the property itself, and to a direct injury arising from the detention.

Vance vs. Vandercook Co., 170 U. S., Text 480.
Burton vs. Holley, 29 Ala., 318.
Fox vs. Harding, 7 Cush., 516-522.
1 Sedgwick on Dam., Sec. 138.
Elder vs. Kutner, 97 California, 490.

TWELFTH SPECIFICATION.

The evidence being as stated in the next preceding paragraph, the defendant requested the Court to instruct

the jury that the inquiry in regard to the loss of time of the employees should be limited to the period between October 1, 1897, and October 11, 1897, and that no damages could be allowed for any time lost after October 11.

Under any view of the case the defendant was entitled to this instruction. The instruction given at plaintiff's request permitted the jury to allow damages for time lost after November 16, 1897, when the mill was shut down because the Bucki Company was unable to purchase the logs with which to operate the mill, and the loss of time should at least have been limited to the period that the mill was shut down in consequence of the detention of the logs.

VI.

THE LAW NEVER PRESUMES THAT DAMAGES HAVE BEEN SUSTAINED, AND THERE IS NO PLACE FOR LEGAL FICTIONS IN THE LAW OF DAMAGES.

THIRTEENTH, FOURTEENTH, FIFTEENTH, SIXTEENTH AND SEVENTEENTH SPECIFICATIONS.

These specifications relate to the same subject matter and will be discussed together.

The bill of exceptions recites that there was no evidence to show that the lumber shipped from the mill was sold for any less than it would have sold for had no attachments been levied on it (Rec., 200), and that all the lumber had been shipped north and delivered to purchasers prior to Dec. 28, 1897, except about 2,000,000 feet of low grade stuff which was on that day seized by other creditors, yet the Court deliberately gave the jury the charges referred to in the 12th and 13th specifications, the first of which invited the jury to conjecture whether some damages had not nevertheless been sustained by reason of the continuance of the lien, and the second of which informed the jury that the plaintiff held this property as the bailee of the sheriff and was bound to redeliver it, etc., notwithstanding the evidence showed plaintiff sold all of it soon after the forthcoming bonds

were given, except certain lumber levied on by other creditors.

There being no evidence that damage resulted from these fictions or presumptions of law, it was error to declare them to the jury, for such a formal statement by the Court served as an invitation to the jury to supply the lack of evidence of damage by conjecture.

"Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration."

Railroad Co vs. Houston 95 U. S., 703.

By the charge quoted in the 14th specification the Court told the jury that in contemplation of law, the plaintiff held the proceeds derived from the sale of the lumber to pay any judgment that might be rendered in the attachment suits, and that he had the right to do so, and that they should award damages on this account for the whole length of time the attachments continued on the property, and by the charge mentioned in the 15th specification, the jury was told that it was their duty to determine how long these attachment liens continued. There was no evidence to show that plaintiff ever did hold the proceeds of the lumber a day after they were received (Rec., 201), and the Court refused to permit the defendant to show that these proceeds were used immediately after their receipt (Rec., 185, 14th exception).

This fiction of law is, perhaps, the most extraordinary that was ever invented, and is an example of what the genius of plaintiff's counsel is capable of. The men that devised the common law fictions would have stood still and admired if they could have seen the like of this.

The statement of the propositions stated in these charges is enough to condemn them. The law does not presume damages, they must be proven, and it was not the duty of the jury to determine how long the liens continued, as that was a matter of law. These instructions were very mischievous. The plaintiff had been permitted to prove that the order dissolving the attachment for $75,000 had been superseded, pending the appeal to the Court of Appeals, which disposed of the case in January, 1899, and the jury were, in effect, instructed to allow damages

on account of a fictitious idea, for all this time. Nor were they told what the measure of damages was. That also was left to their free and untrammeled imaginations. There being no definite evidence of what the lumber sold for, the jury might have experienced great difficulty in assessing damages had they been controlled by the rule applicable in cases of pecuniary loss, but the Court relieved them from that difficulty by telling them "that it was not necessary that an actual, positive amount be determined by you to a mathematical certainty or nicety" (20th specification, Rec., 203).

Another objection to these damages is that they were special and were not claimed in the declaration. For this reason, if for no other, they should not have been submitted to the jury.

Thorwegan vs. King, 111 U. S., 549.
S. F. & W. Ry. Co. vs. Tiedeman, 39 Fla., 196.

EIGHTEENTH SPECIFICATION.

The defendant offered to prove that the proceeds of the lumber were made use of by the plaintiff immediately after receipt and that they were not, in that respect, embarrassed by the forthcoming bonds and this specification of error relates to the rejection of this evidence (Rec., 185, 14th exception). It needs no argument to show that this evidence should have been admitted in view of the claim for damages made by plaintiff on account of the *presumption of law* that the proceeds were held to meet the plaintiff's contingent liability.

NINETEENTH SPECIFICATION.

The Court permitted plaintiff to prove that it gave the Surety Company that executed the forthcoming bond a mortgage on its mill plant to secure it as such surety, and that this mortgage was not released until June, 1899. This was error, for damage to credit from the execution of this mortgage was too speculative and too remote.

Under the authorities no damages could be recovered by reason of the fact that the lien of the attachment

rested on the mill, and certainly none could be recovered on account of this mortgage.

Elder vs. Kutner, 97 Cal., 490.
Marx vs. Strauss et al., 93 Alabama, 453.
Gerard vs. Moore, 24 S. W. Rep., 652.

VII.

TWENTIETH SPECIFICATION.

The Court instructed the jury that it was not absolutely necessary to find a positive amount of damages, determined with mathematical certainty. This was error, since all the damages recoverable in this case were of a pecuniary character.

"Damages not susceptible of legal computation, and which are shadowy, uncertain and speculative cannot be allowed."

Memphis vs. Brown, 20 Wallace, 313-318.

This charge was peculiarly objectionable in view of the charges given with reference to injury to business and to damages growing out of the presumed holding of the proceeds of the lumber. In neither of those cases was there any evidence from which any certain and "positive" amount of damages could be estimated, but this charge supplied the jury with what was lacking in the way of evidence and permitted them to allow damages when there was no evidence that any had had been actually and certainly sustained.

PART II.

BRIEF RELATING TO THE BUCKI COMPANY'S SPECIFICATIONS OF ERROR.

A full statement of facts has been given in the first part of this brief and it is unnecessary to repeat it here.

ARGUMENT.

I.

NO DAMAGES RECOVERABLE FOR INJURY TO CREDIT OR LOSS OF PROFITS.

The 1st to 20th and 22d, 24th 25th, 30th and 32d assignments of error filed by the Bucki Company related to the refusal of the Court to give certain charges relative to injury to credit and loss of profits. These charges were objectionable for the same reasons as certain other charges actually given by the Court, and which are challenged by the third, fourth, fifth and sixth specifications of error presented by the Fidelity Company and argued at pages 36 to 60 of this brief. The authorities on the subject are stated there, and the application of them is made, and the Court is requested to read that section of this brief in connection with these assignments of the Bucki Company.

II.

INTEREST ON THE VALUE OF LUMBER ATTACHED IS NOT RECOVERABLE.

The Bucki Company requested the Circuit Court to allow it interest on the value of the logs and lumber attached during the time the liens of the attachments rested thereon in contemplation of law notwithstanding the giving of the forthcoming bonds. This charge would not have been more injurious than some actually given, but there is no merit in it.

Fullerton Lumber Co. vs. Spencer, 81 Iowa, 549.
Hoyt vs. Fuller, 104 Fed. Rep., 193.

III.

THE ORDER OF THE COURT EXCLUDING TESTIMONY RELATIVE TO INJURY TO CREDIT AND INJURY TO BUSINESS.

The Court admitted a great mass of testimony relative to the credit of plaintiff, all of which showed, however, the plaintiff's credit since June, 1897, had been very bad. The Court also permitted the plaintiff to show that there were large bodies of timber lands near Jacksonville which plaintiff might have bought, if it had had the money, or the credit upon which to borrow the money. The Court likewise permitted the plaintiff to prove that L Bucki & Son, a partnership composed of certain stockholders of the plaintiff company, owned thirty-three miles of railroad and certain logging cars and locomotives (Rec., 69), and that Charles L. Bucki, the president of the Bucki Company, and James J. Hagey, its mill superintendent, had had experience in the logging business. The Court afterwards, on motion of defendant, ostensibly ruled this testimony out, but it is already shown the Court gave the jury certain charges which made it their duty to consider this testimony nevertheless. The Court made no error in ruling this testimony out, for the reasons heretofore given, and the only error committed was in giving charges which permitted the jury to consider whether the plaintiff had financial ability to continue in business subsequent to October 1, 1897 (Rec., 188, 189), thereby rendering its previous order ruling out this testimony wholly negatory.

IV.

THE CONTRACT WITH THE ATLANTIC LUMBER CO.

In the Court below the plaintiff sought to establish that the Atlantic Lumber Co. had no legal right to stop delivering logs on October 1, 1897. Certainly this question was immaterial, for the same consequences resulted from that rescission whether right or wrong, and, if wrong, the Fidelity Company could not be held responsible for the fact.

It has, however, since been held that the Atlantic Lumber Company was justified in stopping.

See L. Bucki & Son Lumber Co. vs. Atlantic Lumber Co., 109 Fed. Rep., 1061.

Respectfully submitted,

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